No. 76- 1684

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

SUPER TIRE ENGINEERING CO., SUPERCAP CORPORATION AND A. ROBERT SCHAEVITZ, *Petitioners,*

v.

LLOYD W. MCCORKLE, COMMISSIONER OF THE DEPARTMENT OF INSTITUTIONS AND AGENCIES OF THE STATE OF NEW JERSEY, ET AL.,

and

TEAMSTERS LOCAL UNION NO. 676, a/w INT'L BHD. OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Super Tire Engineering Co., Supercap Corporation and A. Robert Schaevitz ("Super Tire") hereby petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. pp. 3a-15a) [1] is reported at 550 F.2d 903. The opinion of the federal District Court (Pet. App. pp. 16a-27a) is reported at 412 F. Supp. 78.

JURISDICTION

The judgment of the Court of Appeals was entered on February 25, 1977 (Pet. App. p. 2a). Super Tire's timely petition for rehearing was denied on April 11, 1977 (Pet. App. p. 1a). The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether federal welfare policy as expressed in the Social Security Act and/or federal labor policy as expressed in the National Labor Relations Act prohibits the State of New Jersey from dispersing federal and state welfare payments to employees whose claim arises solely from their being on strike.

2. Whether the Court of Appeals erroneously expanded the *Hicks* v. *Miranda* doctrine [2] in concluding that this Court's summary dismissal of the appeal in *Kimbell, Inc.* v. *Employment Security Comm'n*, [3] a case involving state unemployment compensation, controlled the welfare eligibility question previously remanded for disposition on the merits by this Court.[4]

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[1] "Pet. App." references are to the Petitioners' Appendix attached to this petition.

[2] 422 U.S. 332 (1975) (Hereinafter "*Hicks*").

[3] 429 U.S. —, 97 S.Ct. 36 (1976) (Hereinafter "*Kimbell*").

[4] *Super Tire Engin'r Co.* v. *McCorkle*, 416 U.S. 115 (1974), *vacating*, 469 F.2d 911 (3d Cir. 1972).

STATUTES AND REGULATIONS INVOLVED

The relevant provisions of the National Labor Relations Act (29 U.S.C. §§ 151 *et seq*) are:

> § 2(3) The term "employee" . . . shall include any individual whose work has ceased as a consequence of or in connection with, any current labor dispute . . . and who has not obtained any other regular and substantially equivalent employment . . .
>
> § 9(c)(3) Employees engaged in an economic strike who are not entitled to reinstatement shall be eligible to vote under such regulations as the Board shall find are consistent with the purposes and provisions of this Act in any election conducted within twelve months after the commencement of the strike.
>
> § 13 Nothing in this subchapter, except as specifically provided for herein shall be construed so as either to interfere with or impede or diminish in any way the right to strike . . .

Section 3(f) of the Labor-Management Reporting and Disclosure Act (29 U.S.C. §§ 401 *et seq.*) provides:

> "Employee" means any individual employed by an employer, and includes any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute . . .

The relevant provisions of the Social Security Act (42 U.S.C. §§ 601 *et seq.*) are:

> § 401 For the purpose of encouraging the care of dependent children in their own homes or in the homes of relatives by enabling each State to furnish financial assistance and rehabilitation and other services, as far as practicable under the conditions in such State, to needy dependent children and the parents or relatives with whom they

are living to help maintain and strengthen family life and to help such parents or relatives to attain or retain capability for the maximum self- support and personal independence consistent with the maintenance of continuing parental care and protection, there is authorized to be appropriated for each fiscal year a sum sufficient to carry out the purpose of this part.

§ 402(a)(19) [E]very individual, as a condition of eligibility for aid under [the AFDC welfare program], shall register for manpower services, training, and employment as provided by regulations of the Secretary of Labor (exceptions omitted as not relevant).

§ 407(a) The term "dependent child" shall . . . include a needy child . . . who has been deprived of parental support or care by reason of the unemployment (as determined in accordance with standards prescribed by the Secretary) of his father, and who is living with any of the relatives specified in section 606(a)(1) of this title in a place of residence maintained by one or more of such relatives as his (or their) own home.

The relevant New Jersey statutes and regulations are as follows:

NEW JERSEY ASSISTANCE FOR DEPENDENT CHILDREN LAW, NJSA 44:10-1 *et seq.*

44:10-1. Definitions.

(c) "Dependent child" means a child under the age of 18, or under the age of 21, and a student regularly attending school, college or university, or regularly attending a course of vocational technical training designed to fit him for gainful employment, who

(1) Has been deprived of parental support or care by reason of the death, continued absence

from the home, or physical incapacity of a parent, or, when living with both parents, has been deprived of parental support or care by reason of the unemployment of his father or the insufficient earnings of his parents, and

(2) Is living in New Jersey with his father, mother, grandfather, grandmother, brother, sister, stepfather, stepmother, stepbrother stepsister, uncle, aunt, first cousin, nephew or niece in a place of residence maintained by one or more of such relatives as his or their home, and

(3) Is found, after due investigation and determination, according to standards and procedures established pursuant to this act, to be in need of financial assistance. . .

NEW JERSEY PUBLIC ASSISTANCE LAW
NJSA 44:8-107 *et seq.*

44:8-107. Short title.

This act may be cited as the "General Public Assistance Law."

44:8-108. Definitions.

As used in this act:

"Public assistance" means assistance rendered to needy persons not otherwise provided for under the laws of this State where such persons are willing to work but are unable to secure employment due either to physical disability or inability to find employment, and includes what is commonly called "relief" or "emergency relief" . . .

REGULATIONS

M.A. 1.006
Rev. 3/57

State of New Jersey
Department of Institutions and Agencies
Division of Welfare—Bureau of Assistance

Title: Reimbursement

Subject: Employability as a Condition of Eligibility

A. Citation of Statute and Constitution

Chapter 156, P.L. 1947 (R. S. 44:8-108) defines reimbursable public assistance as "assistance rendered to needy persons not otherwise provided for under the laws of this State, *where such persons are willing to work* but are unable to secure employment due either to physical disability or inability to find employment."

The Constitution of New Jersey 1947, Article I, paragraph 19, guarantees that "Persons in private employment shall have the right to organize and bargain collectively."

B. Interpretation and Policy

• • • • • • • • • •

4. No individual shall be presumed to be unwilling to work, or to be wrongfully refusing to accept suitable employment, merely because he is participating in a lawful labor dispute.

5. An individual who is participating in a lawful labor dispute, and who is needy, has the same right to apply for public assistance, for himself and his dependents, as any other individual who is needy.

6. In the case of an applicant for public assistance who is participating in a lawful labor dispute, there

shall be an investigation of need and other conditions of eligibility, and an evaluation of income and resources, in the same way and to the same extent as in all other cases. In such instances, "strike benefits" or other payments available to the individual from the labor union or other source, shall be considered a resource and shall be determined and accounted for. . . .

• • • • • • • • • •

9. Assistance which is granted consistently with these regulations and all other eligibility conditions, to a needy person will not be excluded from matching State aid merely because such person is engaged in a lawful labor dispute.

Department of Institutions and Agencies

/s/ IRVING ENGLEMAN
Irving Engleman, Chief Bureau
of Assistance

NEW JERSEY ASSISTANCE TO FAMILIES OF THE WORKING POOR LAW, NJSA 44:13 et seq.

44:13-3. Definitions.

As used in this act and for the purposes of determining eligibility to receive financial assistance under this act, the following words shall have the following meanings:

a. "Assistance to the Families of the Working Poor" means the financial assistance and other services to be extended under this act to those families residing in New Jersey which consist of a household composed of two adults of the opposite sex ceremonially married to each other who have at least one minor child under

the age of 18 residing with them, who shall be either the natural child of both, the natural child of one and adopted by the other, or a child adopted by both, and have (i) no income or insufficient income and (ii) no other resources or insufficient other resources, where such absence or insufficiency of income or resources is not the result of a voluntary cessation of employment within 90 days prior to the date of application, or the result of a voluntary assignment or transfer of property within one year prior to the time of application for the purpose of qualifying for public assistance. . . .

STATEMENT OF THE CASE

I. The Undisputed Facts

At least since May 1968, and continuing to date, Teamsters Local Union No. 676 ("the Union") has been the certified collective bargaining representative for Super Tire's production, service, maintenance, and regular truck drivers employed at its Pennsauken, New Jersey plant. On or about May 14, 1971, the parties' collective bargaining contract expired. When negotiations failed to result in agreement on a new contract, the employees represented by the Union commenced an economic strike against Super Tire in support of the Union's collective bargaining demands. This strike continued until on or about June 24, 1971, when the employees voted to return to work. All of the striking employees were reinstated to their former positions by Super Tire before June 28, 1971.

During this six week economic strike, certain striking employees applied for and received monetary benefits under three welfare programs administered or operated by the State of New Jersey. These employees

received monetary benefits under Aid for Dependent Children (AFDC), N.J.S.A. 44:10-1 *et seq.*, and the Aid for Dependent Children of Unemployed Fathers (AFDC-UF), which are joint federal-state programs; and General Public Assistance, N.J.S.A., 44:8-10 *et seq.*, which is solely a New Jersey funded program.[5]

After the strike Super Tire and the Union entered into a successive three year agreement. The current contract expires in June 1977.

II. The Prior Proceedings

On June 10, 1971, Super Tire filed the Complaint upon which this litigation is based. In material part the Complaint alleges that payments to striking employees under the above noted welfare programs violate federal labor policy established in the Taft-Hartley Act, and federal welfare policy established in the Social Security Act. The District Court ordered a hearing on Super Tire's request for a preliminary injunction. The Union and the State of New Jersey moved to dismiss the Complaint "for failure to state a claim upon which relief can be granted" under Rule 12(b)(6) of the Federal Rules of Civil Procedure. During the hearing the Union contended the litigation was moot because the strike had just been concluded. On July 13, 1971, the District Court, in an unpublished order,

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[5] After the strike, the State of New Jersey withdrew from participation in the federal-state AFDC-UF program and substituted a state welfare program Aid to Families of the Working Poor, N.J.S.A. 44:13-1 *et seq.* As the statute has been applied, employees on strike are eligible for benefits. Although no Super Tire employee received benefits under this State program in 1971, the parties stipulated that the validity of this eligibility is also an issue to be decided in the instant case, because the process of collective bargaining is a continuing one with the ever present aspect of the use of the strike weapon by Super Tire's employees.

dismissed the Complaint for failure to state a cause of action and denied Super Tire's motion for preliminary injunction.

On Super Tire's appeal, a majority of the Court of Appeals concluded that Super Tire's cause of action was moot because the employee's eligibility for and receipt of welfare benefits arose solely from their strike conduct and that strike concluded prior to the time the District Court entered its order dismissing the Complaint. The Court of Appeals issued an order instructing the District Court to dismiss the Complaint as moot. 469 F.2d 911 (1972) (J. Gibbons, dissenting).

Super Tire's petition for a writ of certiorari was granted by this Court. 414 U.S. 817 (1973). In a five to four decision, the Court held that Super Tire's Complaint challenging New Jersey's welfare policies was not rendered moot simply because the striking employees had returned to work. *Super Tire Engineering Company, et al.* v. *McCorkle,* 416 U.S. 115 (1974). Speaking for the Court, Mr. Justice Blackmun also said (416 U.S. at 124):

> It cannot be doubted that the availability of state welfare assistance for striking workers in New Jersey pervades every work stoppage, affects every existing collective bargaining agreement, and is a factor lurking in the background of every incipient labor contract.

The Supreme Court remanded the case to the District Court for further proceedings, and the Court of Appeals thereafter entered an order directing the District Court "to take all action, consistent with the judgment and opinion of the Supreme Court to adjudicate the merits of the dispute. . . ."

III. The District Court's Decision

Upon motions for summary judgment filed by Super Tire, the State of New Jersey, the Union, and the City of Camden, the District Court concluded that an evidentiary hearing was unnecessary, granted the State of New Jersey's summary judgment motion, denied Super Tire's motion, and dismissed the Complaint (Pet. App. p. 27a).

In its opinion the District Court ruled that the challenged New Jersey welfare programs were not "inconsistent with the federal welfare policy" (Pet. App. p. 25a). The District Court interpreted the Social Security Act of 1935 and its amendments and concluded that Congress had not expressly excluded strikers and their families from the federal-state AFDC program (Pet. App. pp. 19a-22a). The District Court further concluded that a Congressional intent to exclude strikers from welfare benefits could not be inferred from the enactment of the federal-state AFDC-UF program (Pet. App. pp. 24a-25a). Because Congress apparently allowed strikers to obtain federal food stamps, the District Court declared "it may be concluded that Congress has not perceived these subsistence payments as an infringement upon the collective bargaining process" (Pet. App. p. 27a).

In the absence of any express provision in the Taft-Hartley Act declaring striking employees ineligible for welfare benefits while on strike, the District Court further declared there could be no tension between public monetary support for strikers and national labor policy because if any tension did exist, Congress would have addressed "the problem" (Pet. App. p. 16a). Accordingly, the District Court was unable to

"conclude that New Jersey's refusal to disqualify strikers from their assistance programs is a frustration of the federal labor law's full effectiveness and thereby in violation of the Supremacy Clause of the Constitution" (Pet. App. 27a).

IV. The Decision of the Court of Appeals

In an opinion issued on February 25, 1977, a three-judge panel (Circuit Judges Aldisert and Garth and District Judge McCune) concluded that under the *Hicks* doctrine, this Court's summary action in *Kimbell* required the ruling that New Jersey's practice of paying federal and state welfare benefits to striking employees is fully consistent with federal labor policy (Pet. App. pp. 7a-13a). The panel also held that the federal welfare policy was irrelevant to the validity of New Jersey's welfare programs, and accepted without discussion the District Court's view that New Jersey's payments of federal benefits under the Aid for Dependent Children program was not inconsistent with federal welfare policy (Pet. App. p. 14a). Finally, the panel concluded that Super Tire's challenge to New Jersey's pre-June, 1971 policy of paying strikers federal monies under the Unemployed Parent provision of the AFDC program was moot (Pet. App. p. 14a).

REASONS FOR GRANTING THE WRIT

I. Introduction

Review of the instant case is now essential because the Court of Appeals' decision improperly and erroneously expands the *Hicks* doctrine beyond limitations recognized by this Court, misconceives the doctrine of cooperative federalism in the welfare area, and reinstates a presumption of welfare eligibility nullified by

this Court in *Burns* v. *Alcala*, 420 U.S. 575 (1975). The Court of Appeal's mootness ruling with respect to the AFDC-UF program further ignores this Court's remand mandate in the instant case (416 U.S. 115 (1974)), which mooted only Super Tire's request for injunctive relief, and required a full inquiry on the merits into federal labor law as controlling the validity of New Jersey's welfare regulations.

II. The Decisions Below Are Contrary to Federal Welfare Policy and Recreate the Presumption of Eligibility Nullified in Burns v. Alcala

In *Burns* v. *Alcala*, 420 U.S. 575 (1975), the Court narrowly construed the Social Security Act to preclude benefit eligibility unless Congress has affirmatively legislated inclusion or intended coverage to be optional. 420 U.S. at 580-84. There, certain pregnant mothers sought AFDC benefits for unborn children who met state need requirements and who would be eligible upon birth. In the absence of any positive indication that Congress intended to provide federal assistance to dependent children before birth, the Court concluded that unborn children were not within the class of beneficiaries intended by Congress. Citing section 401 of the Social Security Act,[6] the Court specifically reversed the presumption of eligibility adopted by lower courts because "Congress has not undertaken to provide support for all needy children. . . ." 420 U.S. at 582-83 n. 9. Instead, the Court declared that welfare eligibility should be resolved by reference to legislative purpose, and common definitions of terms. *Id.* at 581-83. This decision governs the questions presented here.

No Respondent contended and neither the Court of Appeals nor the District Court held there was any ex-

[6] Section 401 is set forth *supra*, pp. 3-4.

press or explicit statutory language in the Aid for Dependent Children (AFDC), the Aid for Dependent Children—Unemployed Father (AFDC-UF) or any other federal welfare legislation authorizing optional or mandatory benefit eligibility for workers whose temporary financial need arises solely from their exercise of the public right to strike. The District Court put forward only one legislative reference in support of its decision. When Congress considered enactment of the AFDC-UF program in 1961 on an experimental basis, Congressman Mills said during debate he thought "it is possible" states could use "their own funds" obtained from "general taxpayers funds" to support persons unemployed as a result of a labor dispute. 107 Cong. Rec. 3766 (1961) (Remarks of Cong. Mills).

This one statement is hardly a sufficient basis for concluding that the entire Congress has authorized optional (or mandatory) eligibility under the heavy burden of affirmative intent established in *Burns* v. *Alcala*. Rather, to paraphrase this decision (420 U.S. at 581), the failure of Congress to provide explicitly for the special circumstances of striking workers strongly suggests Congress did not intend the states to authorize such eligibility. And Congressman Mills' views, made in the context of participating states retaining the sole discretion to define unemployment and thus to expand or contract "eligibility", were totally supplanted by the 1968 amendments to the AFDC-UF program. "An important purpose of the 1968 amendments was to eliminate the variations in state definitions of unemployment . . . ." *Philbrook* v. *Glodgett*, 421 U.S. 707, 719 (1975). Congress further limited the scope of the AFDC-UF program by

requiring claimants to have "a substantial connection with the work force". H.R. Rep. No. 544, 90th Cong., 1st Sess. 17 (1967). The House wanted to limit eligibility to persons currently without jobs who had demonstrated some work capacity. The Senate objected only that this restriction eliminated eligibility for persons with a long jobless history, but ultimately this limitation was accepted at conference. H.R. Conf. Rep. No. 1030, 90th Cong., 1st Sess. 57-8 (1967); S. Rep. No. 744, 90th Cong., 1st Sess. 28 (1967). These documents describe a legislative concept of "unemployment" applicable only to persons currently without a job. And this is emphasized by Congress' insistence that AFDC-UF eligibility be strictly tied to incentives to improve employability. "Your committee believes that . . . virtually all unemployed fathers of AFDC children can be trained for and placed in productive employment." H.R. Rep. No. 544, 90th Cong., 1st Sess. 97 (1967). See § 402(a)(19)(E).

Since strikers are specifically defined as employed, not unemployed, persons under the National Labor Relations Act (NLRA),[7] have a continuing uninterrupted, as opposed to a substantial, attachment to the work force, and retain their job with their employer during the term of the strike, it is incongruous at least for Congress to have authorized states to enroll them in federal welfare programs. Moreover strikers do not fit any of the standard eligibility criteria applicable to these welfare programs. A striker is not in the job market, and rarely seeks another position because he desires to return to his current job where seniority has accumulated pension and other benefits. Nor do most

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[7] See *infra*, pp. 20-23.

striking employees need training in order to return to their jobs. They necessarily possess marketable and essential skills by virtue of their current employment. There is no necessity to determine "prior attachment" to the work force because, unlike the worker without a job, a striking employee has never left the active work force. Because a striking employee retains his job and is likely to return to it rather than seek a new position when the strike concludes, he does not need or desire the assistance of required registration on an out-of-work list to find an employer who will make him a job offer. These 1968 amendments affirmatively exclude striking employees, because as a matter of legislative chronology, Congress was well aware that it had legislated in the NLRA to preserve a strikers job rights during any labor dispute.

Other legislative materials relevant to the intent of Congress in enacting the AFDC-UF program also affirmatively demonstrate an intent to exclude such eligibility. In 1961 Congress for the first time created benefit eligibility for an unemployed father living at home with a dependent child (AFDC-UF). "At present needy families in which need is occasioned by unemployment are not eligible for any type of 'federal' assistance. . . ." S. Rep. No. 165, 87th Cong., 1st Sess. 1 (1961). This amendment was not designed to provision striking employees with children Rather, Congress chose to relieve need specifically occasioned by widespread unemployment caused, not by labor disputes, but by the 1959-60 economic recession. Congress also desired to eliminate any financial incentive for the father to abandon the home to render the child eligible for benefits. Hearings on H.R. 3854 and H.R. 3865 before the House Committee on Ways and Means, 87th

Cong., 1st Sess. 94-95 (1961); 107 Cong. Rec. 1677, 1679 (1961) (Message of Pres. Kennedy); 107 Cong. Rec. 3759-60 (1961) (Remarks of Cong. Mills). This amendment then was a response to a particular need and was fashioned primarily to aid "employable" fathers who *involuntarily* lost jobs by operation of recessionary business cycles, and who needed financial assistance to maintain a family while actively seeking to re-enter the work force. 107 Cong. Rec. 3767-3768 (1961) (Remarks of Cong. Byrnes); S. Rep. No. 165, 87th Cong., 1st Sess. 3 (1961); H.R. Rep. No. 1414, 87th Cong., 2d Sess. 15 (1962).[8]

Nor is there any support for striker eligibility in the AFDC program. This welfare program was originally created in 1935 (contemporaneously with the NLRA)

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[8] As one commentator has summarized:

> strikers clearly do not fit within any of the categories of unemployed persons whom Congress attempted to assist through the AFDC-U[F] program. A striker's unemployment is not directly caused by recession or inability to learn and hold a job. Rather, its results from the use of economic pressure to break a dead lock in collective bargaining.

Note, *Welfare for Strikers*, 39 U. Chi. L. Rev. 79, 90 (1972).

In light of this legislative history, the defeat of several legislatibe efforts since 1968 to specifically exclude strikers' coverage under the AFDC-UF program is not determinative evidence that Congress intended to authorize such eligibility. H.R. 6004, 92d Cong., 1st Sess (1971) (not reported out of committee); amendment to H.R. 1, 92d Cong., 1st Sess., § 448, 1971 (defeated); S. Rep. No. 92-1230, 92d Cong. 2d Sess. 108, 472-73 (1972) (amendment deleted before bill voted on the Senate floor). Rather, it is at least as plausible to infer that these amendments originated out of congressional awareness of erroneous interpretations of the purposes of this program, and therefore simply constitute an effort to clarify the original congressional intent. To paraphrase *Burns* v. *Alcala*, *supra*, 420 U.S. at 586 n.12, it would be equally plausible to suppose that the sponsers of these proposals merely wanted to make the original intent clear.

to enable widowed or divorced mothers to cease all employment and remain in the home to rear children who otherwise would become public wards. *Steward Mach. Co.* v. *Davis,* 301 U.S. 548, 586 (1935); *Burns* v. *Alcala, supra,* 420 U.S. at 581-82, *Philbrook* v. *Glodgett, supra,* 421 U.S. at 709. In 1950, an amendment authorized payments for the child's caretaker if the child met state need requirements and had been deprived of the support of a parent by virtue of death, disability or absence from the home. 64 Stat. 551 (1950). These amendments nevertheless continue to reflect the limited purpose of the original program which did not contemplate that employed workers on strike would be the at home caretakers of dependent children. In *Carleson* v. *Remillard,* 406 U.S. 598, 603 (1972), the Court reviewed the AFDC program and concluded it was designed "to meet a need unmet by depression-era programs aimed at providing work for breadwinners. That need was the protection of children in homes without such a breadwinner." A striking employee, however, is not a breadwinner without work within this eligibility category. A striking employee is employed and his children do have a breadwinner in the home.

The decisions below which authorize New Jersey to use federal AFDC and AFDC-UF and state funds under its General Assistance and Families of the Working Poor programs are flatly inconsistent with this Congressional intent and with national welfare policy. Since 1935, the federal role in the public welfare area has increased to the point where this area is at least one of "cooperative federalism". See generally Grey, *Property and Need: The Welfare State and Theories of Distributive Justice,* 28 Stan. L. Rev. 977 (1976). Congress has not precluded all state experimentation,

but here, Congress has interdicted welfare eligibility for striking employees and thus all states must respect this Congressional judgment. Inconsistent state laws are limited by the Supremacy Clause to properly reconcile federal and state welfare systems. Cf. *Burbank* v. *Lockheed Air Terminal,* 411 U.S. 624, 633 (1973); *Townsend* v. *Swank,* 404 U.S. 282, 286 (1971); *Rice* v. *Santa Fe Corp.,* 331 U.S. 218, 230 (1947). Otherwise, states could with impunity frustrate the overriding principle of national welfare policy that limited resources should go only to those most in need, and states could use federal funds to free state monies to pay non-indigent claimants.[9]

Accordingly, review and reversal of these decisions is imperative in order to preserve these limited welfare funds for authorized recipients.[10]

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[9] New Jersey acknowledged the binding effect of federal welfare policy by arguing below that its own payments were permissible because they merely implemented federal welfare policy, and because New Jersey's Assistance to the Working Poor program is the precise equivalent of the federal AFDC-UF program.

[10] The Court's remand decision in the instant case precludes the Court of Appeal's ruling (Pet. App. p. 14a) that Super Tire's challenge to New Jersey's grant of AFDC-UF benefits to its striking employees is moot because New Jersey withdrew from the AFDC-UF program after the 1971 strike. This Court was aware of this fact (416 U.S. at 118 n. 2), but then held (416 U.S. at 121) that "only one aspect of the lawsuit" is moot, "that is the request for injunctive relief" because certain employees actually received AFDC-UF benefits. Thus, the underlying issue between the parties remains, whether state welfare authorities may use four programs to assist striking employees during labor disputes. See *Carrol* v. *Princess Anne,* 393 U.S. 175, 179 (1968). And since renewed New Jersey participation in the AFDC-UF program is now under discussion in the legislature, benefit eligibility for striking employees under this program continues to cast a continuing and brooding shadow upon the impending collective bargaining negotiations between Super and the Union. This Court has recognized that the Unemployed Father program is simply one aspect

III. The Decision of the Court of Appeals Disregards the Court's Mandate to Examine Federal Labor Laws to Decide the Eligibility Question Presented

The Court recognized in *Super Tire Eng'r Co.* v. *McCorkle,* 416 U.S. 115, 124 (1974):

> It cannot be doubted that the availablity of state welfare assistance for striking workers in New Jersey pervades every work stoppage, affects every existing collective bargaining agreement, and is a factor lurking the background of every incipient labor contract.

and then stated (416 U.S. at 124):

> The question, of course, is whether Congress, explicitly or implicitly, has ruled out such assistance in its calculus of law regulating labor-management disputes.

While federal labor statutes may not *explicitly* preclude strikers from receiving welfare benefits, it is clear that Congress has *implicitly* "ruled out such assistance".

The peaceful use of economic weapons by employees to secure collective bargaining objectives is an area fully governed and occupied by federal law and procedures. And since 1935, federal labor laws have considered striking workers not to be "out of work" or "unemployed" because of a labor dispute but to remain employees of their struck employer. In section 2(3) of the National Labor Relations Act,[11] Congress preserved the employer-employee relationship during a strike in order to permit workers to use self-help to obtain increased monetary and other benefits without concurrently forfeiting their jobs. As the Court stated in *NLRB* v. *Erie Resistor Corp.,* 373 U.S. 221, 233 (1963): "§ 2(3) preserves to strikers their unfilled positions and status as employees during the pendency of a strike." See also H.R. Conf. Rep. No. 510, 80th Cong., 1st Sess. 59 (1947); *NLRB* v. *Fleetwood Trailer Co.,* 389 U.S. 375, 381 (1967); *NLRB* v. *Mackay Radio & Tel. Co.,* 304 U.S. 333, 345 (1938).[12] Congress reenacted this definition in 1959 in section 3(f) of the Labor-Management Reporting and Disclosure Act,[13] and the Federal Bureau of Labor Statistics properly follows this legislative command by classifying workers involved in labor disputes as "employed persons". Handbook of Labor Statistics 1-2 (1970).

Section 9(c)(3) of the National Labor Relations Act as amended in 1959 also affirms the congressional intent to continue an employee-employer relationship notwithstanding a strike.[14] This provision declares workers to be eligible to vote in Board conducted elections while they are actually on strike. Congress be-

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of the overall AFDC program limited by § 401 of the Act, and this section controls the welfare eligibility questions for both AFDC and AFDC-UF. *Philbrook* v. *Glodgett, supra,* 421 U.S. at 713.

[11] Section 2(3) is set forth *supra,* p. 3.

[12] The Labor Board and the federal circuit courts agree unanimously that economic strikers retain employee status even after they have been permanently replaced, and the struck employer is required to offer such replaced strikers on opportunity to return to work whenever the permanent replacements depart. *Laidlaw Corp.* v. *NLRB,* 414 F.2d 99, 103 (7th Cir. 1969), *cert. denied,* 397 U.S. 290 (1970); *H&F Binch Co.* v. *NLRB,* 456 F.2d 357, 363, n. 5 (2d Cir. 1972) and cases there cited. See also *Reinstatement: Expanded Rights for Economic Strikers,* 58 Calif L. Rev. 511 (1970).

[13] Section 3(f) is set forth *supra,* p. 3; see also, *Brennan* v. *Independent Lift Truck Builders Union,* 490 F.2d 213, 217 (7th Cir. 1974) (discharged union member retains employee status within § 3(f) while discharge is contested before NLRB).

[14] Section 9(c)(3) is set forth *supra,* p. 3.

lieved that even permanently replaced striking workers retain by virtue of their job rights a continuing "community of interest" with their fellow strikers and nonstrikers so as to warrant their full participation in any selection of collective bargaining agent. S. Rep. No. 187 on S. 1555, 86th Cong., 1st Sess. 31-32 (1959); *W. Wilton Wood, Inc.*, 127 NLRB 1675, 1677 (1960); see also *NLRB* v. *Erie Resistor Corp., supra,* 373 U.S. at 233 n.12. Thus, unlike an employee who loses his job by the operation of economic forces beyond his control, a striking worker "still lays claim to his position and asserts a right to go back and take it at more advantageous terms." *Jeffrey-DeWitt Insulator Co.* v. *NLRB,* 91 F.2d 134, 138 (4th Cir. 1937), *quoting, State* v. *Personett,* 114 Kan. 680, 220 P. 520, 524 (S.Ct. Ks. 1923).

The conclusion that strikers can be regarded as "out of work" or "unemployed" while on strike and thus eligible for welfare payments is totally foreign to these federal definitions of striking employees. Because Congress has consistently defined striking employees as active members of the work force for the purposes of federal labor laws, this definition constitutes a clear legislative judgment that self-help, not dependence on welfare aid, is the authorized avenue for economic advancement. The considerations that federal labor policy "leaves the adjustment of industrial relations to the free play of economic forces" (*Phelps Dodge Corp.* v. *NLRB,* 313 U.S. 177, 183 (1941))[18] and that welfare payments to striking employees directly and substantially affects and alters the balance of economic power existing between the bargaining

[18] *Accord: NLRB* v. *Nash-Finch Co.,* 404 U.S. 138, 144 (1971).

parties (416 U.S. at 124), make it very unlikely Congress intended such eligibility absent an express affirmative legislative indication. No such authorization can be found in the legislative histories of either the Social Security Act or the National Labor Relations Act.

IV. The Decisions Below Merge Without Legislative Support Separate Systems Created by Congress to Aid Different Segments of the Population

Congress has distinguished between those out of work and those holding jobs and has created different and separate means of aiding their economic welfare. As Judge Duniway stated in *Macias* v. *Finch,* 324 F. Supp. 1252, 1260 (N.D. Cal.), *aff'd without opinion,* 400 U.S. 913 (1970):

> Congress by legislating as it has, has distinguished between the unemployed and the underemployed, and has applied different solutions to the problems of each group.

As we have shown, *supra,* pp. 13-19, the Social Security Act provides no implication whatever as originally enacted in 1935 or as amended that Congress was concerned about the hardships to children of employees resulting from the exercise of economic weapons during bargaining disputes. The economic adversity, if any, suffered as a result of a labor dispute was not the type of misfortune which Congress intended to mitigate by direct federal financial assistance. Congress intended the state-federal welfare programs to protect children and the nuclear family from the total employment disruption caused by the impersonal operation of recessionary business cycles.

In contrast, Congress created for the "working man" (*Chemical Wkrs.* v. *Pittsburgh Glass,* 404 U.S. 157, 166 (1971)) protections for the exercise of collective bargaining to improve economic conditions through self-help. See also *Anchor Motor Freight* v. *Hines,* 424 U.S. 554, 563 (1976). Congress also enacted the Fair Labor Standards Act [16] "to aid the unprotected, unorganized and lowest paid of the nations working population". *Brooklyn Bank* v. *O'Neil,* 324 U.S. 697, 707 n.18 (1945).

The *temporary* loss of wages resulting from the exercise of the federal right to strike is not sufficient to transform the self-sufficient breadwinner into a proper recipient of federal welfare benefits. The Court noted the difference between these separate systems for aiding the economic well being of two distinct groups of citizens in *Carleson* v. *Remillard,* 406 U.S. 598 (1972). There, the Court's holding expressed through Mr. Justice Douglas that children of fathers away from home on military service were eligible for federal AFDC benefits was based in significant part on the rationale that, unlike union represented employees in the private sector, personnel on active military service are without access to a union or to collective bargaining to assist the advancement of their economic circumstances. 406 U.S. at 603.

Any temporary financial need which arises solely from the exercise of the right to strike is plainly outside the scope of the states legitimate solicitude for its disadvantaged citizens. It is simply a perversion to attempt to broaden this concern to include wage earners and breadwinners who have the self-sufficiency to pro-

[16] Act of June 25, 1938 c 676, 52 Stat. 1060, 29 U.S.C. §§ 201 *et seq.*

vide for their own economic well-being. And when properly reviewed there is no tension between welfare and labor policies because full effect to the purposes of each Act can be easily achieved by the reasonable and unavoidable conclusion that Congress distinctly left striking employees to private rather than public aid to alleviate any economic hardships occasioned by the exercise of the protected federal right to strike during collective bargaining.

V. The Court of Appeals Improperly Applied the Hicks Doctrine

The Court of Appeals held (Pet. App. pp. 7a-10a) that the Supreme Court ruled in *Kimbell,* without the benefit of any briefs or oral argument directed to the merits, that *all* tax supported payments to any employees in all labor disputes can never conflict with national labor policy. This assumption is simply unwarranted in light of the limited nature of the unemployment compensation benefits involved in *Kimbell,* and in light of the Court's first opinion in the instant case. Moreover, because the *rationalis* of *Kimbell* is indeterminable and the instant case involves a broad, rather than limited, grant of welfare aid to striking employees, this case is beyond the reach of the *Hicks* doctrine.

This Court has already given the instant case plenary review, and ruled that Super Tire's federal labor law challenge to New Jersey's welfare regulations presented an "important" question. *Super Tire Eng'r Co.* v. *McCorkle, supra,* 416 U.S. at 127. This opinion was not limited to mootness, for the Court would not have remanded for hearing on the merits if the issues were frivolous. In accepting the case,

the Court granted certiorari on both the mootness ruling of the Third Circuit and the merits ruling of the Federal District Court which dismissed the complaint for failure to state a cause of action. Since this Court did not offer any explication for its summary ruling in *Kimbell,* there is no basis for assuming the Court itself has changed its fully articulated view in *Super Tire* that the instant challenge to *welfare* payments to strikers requires close judicial scrutiny of federal labor policy. Whatever the New Mexico Supreme Court's *rationalis* in *Kimbell,* it can not plausibly be claimed that that court included analysis of pertinent congressional documents relating to the creation of a welfare system for "unemployed" persons: the issue was never before them in either *Kimbell* or the incorporated by reference decision which provided the basis for the *Kimbell* opinion.[17]

The Court of Appeals (Pet. App. p. 13a) declared that if striking employees could receive unemployment compensation then *a fortiori* welfare payments could also be provided since such payments were less in amount than unemployment compensation. But this reasoning still avoids specific reference to federal labor laws in the *welfare* context, and also ignores the different policy considerations which the District Court found (Pet.App. 26a n.20) in agreement with the First Circuit, required "separate consideration".

[17] *Albuquerque-Phoenix Express* v. *Empl. Security Com'n,* 88 N.M. 596, 544 P.2d 1161 (1975). There the employer requested review of only four issues: whether the strikers were available for work, whether the employer's business had been substantially curtailed by the strike, whether the strikers were disqualified for leaving work without good cause or for ceasing work during working hours. 88 N.M. 597-98, 544 P.2d 1162-63.

In its Motion to Dismiss filed in the *Kimbell* case, the State of New Mexico was unable to decide whether the New Mexico Supreme Court had ruled the issue posed was "exclusively one of state law" or "that the potential interference with federal labor policy was too remote and tangential to outweigh state interest" (Pet. App. pp. 29a-30a). The New Mexico Supreme Court's failure to articulate the basis of its ruling precludes the very inquiry mandated under the *Hicks* doctrine.

In *Hicks* the Court carefully limited the binding effect of summary dismissals to cases where similar challenges are raised to similar state statutes. 422 U.S. at 345 n. 14. As one commentator has stated: "When the Supreme Court dismisses a challenge to a state statute, it does not necessarily mean that the statute is valid in all circumstances, it signifies only that the challenge is not a 'substantial' one in the precise circumstances of that case." Comment, *The Precedential Weight of a Dismissal by the Supreme Court for Want of a Substantial Federal Question; Some Implications* of *Hicks* v. *Miranda,* 76 Colum. L. Rev. 508, 532 (1976). Here the legal challenges and the New Jersey statutes and regulations are polls apart from the pre-emption issue allegedly ruled upon in *Kimbell.*

In *Kimbell,* the New Mexico unemployment compensation statute granted strikers cash payments only if the struck employer was not compelled to close down all or most of its operation. Here, the New Jersey regulations which implement both state and federal AFDC and AFDC-UF payments grant cash benefits for any lawful strike regardless of impact upon the employer's business. New Jersey, as this Court recognized in its remand decision, broadly aids

strikers in all strikes, not just those where the employer's operation is unaffected, and this aid does affect Super Tire's labor relations with its employees. Indeed, in its Motion to Dismiss in *Kimbell,* New Mexico distinguished the instant case from the limited grant of benefits available in that state (Pet. App. p. 30a).

It is also plain that the legal challenges rest on different grounds. Super Tire has not raised only a claim based upon federal pre-emption, The Court's remand decision suggests and Super Tire has also alleged in the courts below that accommodation of federal welfare and labor policies precludes states from granting welfare benefits to striking employees whether from federal or wholly state supplied funds. Only if all such payments are proscribed even when, as here, justified as furthering federal welfare policy [18] will "the obvious purpose in the enactment of each (legislative scheme) (be) preserved." *Bhd. of R. R. Trainmen* v. *Chicago R. & I. R.R.,* 353 U.S. 30, 40 (1957).

[18] "[A] state law is not to be declared a help because it attempts to go farther than Congress has seen fit to go." *Charleston & Western Carolina R. Co.* v. *Varnville Furniture Co.,* 237 U.S. 597, 604 (1915) (per M. J. Holmes).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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May, 1977.

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 76-1869

SUPER TIRE ENGINEERING CO., ET AL., *Appellants*

v.

LLOYD W. McCORKLE, ETC., ET AL.

SUR PETITION FOR REHEARING

Present: SEITZ, *Chief Judge*, VAN DUSEN, ALDISERT, GIBBONS, ROSENN, WEIS and GARTH, *Circuit Judges*, and McCUNE, *District Judge*.

The petition for rehearing filed by Appellants in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,
/s/ ALDISERT
Judge

Dated: April 11, 1977

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* Judges Adams and Hunter did not participate in the consideration of this matter.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 76-1869

SUPER TIRE ENGINEERING COMPANY; SUPERCAP CORPORATION; and A. ROBERT SCHAEVITZ, *Appellants*

v.

LLOYD W. McCORKLE, Commissioner of the Department of Institutions and the Agencies of the State of New Jersey; IRVING J. ENGELMAN, Director of the Division of Public Welfare of the Department of Institutions and Agencies of the State of New Jersey; FRED L. STRENG, Director of the Camden County, New Jersey Welfare Board; and JUANITA E. DICKS, Welfare Director of the Municipal Welfare Department of the City of Camden, New Jersey

LOCAL 676, TEAMSTERS UNION, ETC., (Intvr. in D. C.)

(D. C. CIVIL ACTION No. 853-71)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Present: ALDISERT and GARTH, *Circuit Judges* and McCUNE,* *District Judge.*

Judgment

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel on February 14, 1977.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed May 19, 1976, be, and the same is hereby affirmed. Costs taxed against the appellants.

ATTEST:

/s/ M. ELIZABETH FERGUSON
Chief Deputy Clerk

February 25, 1977

* Honorable Barron P. McCune, of the United States District Court for the Western District of Pennsylvania, sitting by designation.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 76-1869

SUPER TIRE ENGINEERING COMPANY;
SUPERCAP CORPORATION; and
A. ROBERT SCHAEVITZ,
Appellants,

v.

LLOYD W. McCORKLE, Commissioner of the Department of Institutions and Agencies of the State of New Jersey; IRVING J. ENGELMAN, Director of the Division of Public Welfare of the Department of Institutions and Agencies of the State of New Jersey; FRED L. STRENG, Director of the Camden County, New Jersey Welfare Board; and JUANITA E. DICKS, Welfare Director of the Municipal Welfare Department of the City of Camden, New Jersey

LOCAL 676, Teamsters Union, etc.,
(Intervenor in District Court)

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

(D.C. Civil Action No. 853-71)

Argued February 14, 1977

Before: ALDISERT and GARTH, *Circuit Judges,* and McCUNE, *District Judge.**

* Honorable Barron P. McCune, of the United States District Court for the Western District of Pennsylvania, sitting by designation.

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OPINION OF THE COURT

(Filed February 25, 1977)

ALDISERT, *Circuit Judge.*

This appeal raises two parallel issues: whether New Jersey regulations[1] which permit welfare payments to

1. General Public Assistance Law, N.J.S.A. § 44:8-107 *et seq.*; Assistance to Families of The Working Poor, N.J.S.A. § 44:13-1 *et seq.*; Assistance for

workers on strike are inconsistent with and, therefore, precluded by federal labor policy; and whether those same regulations are inconsistent with and precluded by federal welfare policy. The district court concluded that New Jersey's regulations were not contrary to either federal policy and granted the defendants' motion for summary judgment. Believing that the labor policy issue is foreclosed by *Kimbell, Inc. v. Employment Security Commission*, — U.S. — , 45 U.S.L.W. 3247 (No. 75-1452, Oct. 4, 1976), and agreeing with the district court's analysis of the welfare policy issue, we affirm.

I.

This case has been in litigation since 1971, and has been in this court before. The strike that precipitated the action was settled in June, 1971, during the initial proceedings in the district court. That court nevertheless ruled on the merits and an appeal was taken here. Concluding that the settlement of the strike mooted the case, we remanded the proceedings with directions to vacate and dismiss as moot. 469 F.2d 911 (3d Cir. 1972). The Supreme Court granted certiorari to consider the mootness issue and disagreed with our conclusion, holding that "the facts here provide full and complete satisfaction of the requirement of the Constitution's Art. III, § 2, and the Declaratory Judgment Act, that a case or controversy exist between the parties." 416 U.S. 115, 122 (1974). Accordingly, our judgment was reversed and the case remanded for further proceedings on the merits. Those proceedings have now been held in the district court and a decision has been rendered that New Jersey's practice of paying welfare benefits to strikers is not inconsistent with federal labor or welfare policy. The correctness of that decision is the subject of the present appeal to this court.

1. (Cont'd.)
Dependent Children, N.J.S.A. § 44:10-1 *et seq.*; Aid to Needy Families with Dependent Children of Unemployed Fathers, 42 U.S.C. § 607. (*See* part III, *infra.*)

II.

The essence of appellants' argument concerning federal labor policy is that New Jersey's welfare payments to workers on strike enhance the economic strength and resiliency of the union in collective bargaining, thereby distorting the bargaining process and interfering with the free operation of economic forces which federal labor policy seeks to preserve in the collective bargaining process. Whatever merit this argument might have had in the past, we believe that it is now foreclosed by the Supreme Court's dismissal for want of a substantial federal question in *Kimbell, Inc. v. Employment Security Commission, supra.*

A.

Kimbell was an appeal under 28 U.S.C. § 1257(2) [2] from the Supreme Court of New Mexico to the Supreme Court of the United States. In *Kimbell*, the lower state court, the New Mexico District Court, had made an express finding that "payment of unemployment compensation benefits to the claimants herein [who were on strike] would interfere with the national policy of Federal Labor Law of encouraging self organization and collective bargaining without state interference." This ruling was directly challenged on appeal to the state Supreme Court. Point III of the appellant's brief in chief before that court was as follows:

> Payment of unemployment compensation benefits to claimants whose unemployment is due to a labor dispute raises no constitutional conflict with federal

2. § *1257. State courts; appeal; certiorari*
Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
. . .
(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

labor policy under the supremacy clause of Article VI of the United States Constitution.[3]

The New Mexico Supreme Court reversed summarily:

> On the basis of the Court's opinion in Albuquerque-Phoenix Express vs. Employment Security Commission (No. 10247, Opinion filed December 24, 1975), the Judgment of the District Court of the Second Judicial District is reversed.

The cited opinion, *Albuquerque-Phoenix Express,* had been filed 5 days earlier and adjudicated certain state law issues relating to the payment of unemployment compensation to strikers. In a footnote, however, the New Mexico Supreme Court rejected the notion that such payment might be contrary to federal labor policy:

> We note the recent case of Hawaiian Tel. Co. v. State of Hawaii Dept. of L. and I. Rel., — F.Supp. — (D. Hawaii 1975), wherein the Federal District Court of Hawaii declared that the State of Hawaii's interpretation and application of the "stoppage" of work clause in its Unemployment Compensation Act so impermissibly alters the relative economic strength of union versus employer in their bargaining relationship as to thereby encroach upon the field preempted by the National Labor Relations Act in violation of the supremacy clause of the U.S. Constitution. We do not find this decision persuasive because it totally overlooks the fact that in order to qualify for unemployment compensation a striker must be available for, and actively seeking work.

Albuquerque-Phoenix Express, Inc. v. Employment Security Commission, 88 N.M. 596, 544 P.2d 1161 (1975).

3. This information is obtained from the jurisdictional statement filed in the United States Supreme Court by counsel for Kimbell, Inc.

In a motion for rehearing in the New Mexico Supreme Court, counsel for Kimbell, Inc. objected that the federal issue "was not, according to the understanding of counsel for Appellees, raised in the appeal in *Albuquerque-Phoenix Express,*" that the statement in that case was "mere *dicta*" and that the issue "should be specifically addressed by this Court in order that the matter be clearly presented in further proceedings, if necessary, before the United States Supreme Court." The motion for rehearing was denied, and appeal was subsequently taken to the United States Supreme Court under § 1257(2). According to the Solicitor General's Memorandum for the United States as Amicus Curiae,[4] the question presented to the Supreme Court was "whether New Mexico's limited grant of unemployment compensation benefits to strikers is in conflict with, and thus precluded by, federal labor law." The appeal was dismissed for want of a substantial federal question.

Hicks v. Miranda, 422 U.S. 332, 344 (1975) teaches that votes "to dismiss for want of a substantial federal question, it hardly needs comment, are votes on the merits of a case." (quoting *Ohio ex rel. Eaton v. Price,* 360 U.S. 246, 247 (1959)). Of course, in such cases of summary adjudication, it is not always crystal clear what exactly was adjudicated by the Supreme Court. In this case, moreover, we face the double difficulty that the state court decision appealed from was also a summary adjudication. But here we have had the advantage of thorough briefing, including supplemental briefing, and we have been able to examine the relevant state court decisions as well as the pertinent pleadings filed in the New Mexico courts and the United

4. We have also examined the appellants' Jurisdictional Statement, the appellees' Motion to Dismiss the Appeal, and the brief of the Chamber of Commerce of the United States of America as Amicus Curiae filed in the United States Supreme Court in the *Kimbell* appeal. Though differing in phraseology, all present the federal labor policy question. The appellees' Motion to Dismiss, for example, phrases the question presented thus:

> Does the grant of unemployment compensation benefits to strikers by the State of New Mexico contravene the Supremacy Clause of Article VI of the Constitution of the United States by interfering with the preemptive jurisdiction of federal labor law?

States Supreme Court in *Kimbell*. We can only conclude that, when the Supreme Court dismissed for want of a substantial federal question in *Kimbell*, the necessary predicate for that dismissal was a determination that federal labor policy did not preclude the payment of unemployment compensation to strikers. That determination controls the labor policy aspect of this case.

B.

In their Reply and Supplemental Briefs appellants advance essentially three arguments to avoid the peremptory effect of *Kimbell*. First, citing *Herb v. Pitcairn*, 324 U.S. 117 (1944) they argue that the state court decision appealed from in *Kimbell* rested on non-federal grounds and was, therefore, not subject to review in the United States Supreme Court. In a related, but distinct, second argument they contend that the New Mexico Supreme Court did not decide the federal issue in *Kimbell* and, accordingly, that the Solicitor General's Memorandum "addressed an issue not decided below." Third, they argue that, if *Kimbell* has precedential force, it is nevertheless distinguishable because it involved unemployment compensation, not welfare benefits. These arguments all miss the mark.

Herb v. Pitcairn is a lineal descendant of Mr. Justice Miller's celebrated opinion in *Murdock v. City of Memphis*, 20 Wall. 590, 22 L. Ed. 429 (1875), which established the principle that the Supreme Court will not review for federal error the judgments of state courts that rest upon independent and adequate state grounds. But that principle is inapplicable to an analysis of *Kimbell* for the simple reason that there could be no state ground that would be adequate to support New Mexico's payment of unemployment compensation to strikers if such payment were precluded by federal law.

Appellants' second argument is more troublesome but equally unavailing. To the extent that appellants are contending that the federal issue was not *raised* in the state

Supreme Court in *Kimbell*, they are simply wrong. As we have indicated, the lower state court expressly decided the federal issue and its decision was directly challenged on appeal. "No particular form of words or phrases is essential, but only that the claim of invalidity and the ground therefor be brought to the attention of the state court with fair precision and in due time. And if the record as a whole shows either expressly or by clear intendment that this was done, the claim is to be regarded as having been adequately presented." *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 67 (1928) (quoted in C. WRIGHT, FEDERAL COURTS § 107, at 541 (3d ed. 1976). We have found no indication whatsoever that the federal issue was not timely and properly raised before the New Mexico Supreme Court in *Kimbell*. Appellants, in their Supplemental Brief in this court, admit that the federal issue "was briefed by both sides to the New Mexico Supreme Court." Appellants' Supplemental Brief at 6. Indeed, if the United States Supreme Court had concluded that the validity of the state law had not been timely "drawn in question" on federal grounds as required by § 1257(2), it would not have entertained jurisdiction in *Kimbell*. *See, e.g., Herndon v. Georgia*, 295 U.S. 411 (1935).

To the extent that appellants, in their second argument, are contending that the federal issue, though raised, was not *decided* by the state high court in *Kimbell* they ignore both the reference to *Albuquerque-Phoenix Express* and, more elementally, the basic jurisprudential fact that not to decide is to decide. Federal rights "are denied as well by the refusal of the state court to decide the question, as by an erroneous decision of it." *Lawrence v. State Tax Commission*, 286 U.S. 276, 282 (1932). The federal question was raised and, if decided adversely to state law, it was controlling. Under these circumstances, a state high court does not defeat federal review merely by issuing a tight-lipped decision in favor of the challenged state law. The New Mexico Supreme Court may not have *discussed* the federal

issue in its summary disposition in *Kimbell* but for purposes of § 1257(2) it necessarily *decided* the issue, adversely to the claim that the state practice offended federal law when it reversed the lower court's decision upholding the notion that payment of state unemployment benefits interfered with the national labor policy. This would be so even if the reversal had not cited *Albuquerque-Phoenix Express.* Again, if the United States Supreme Court had concluded that there was no "decision" in favor of the validity of the state law as required by § 1257(2), it would not have entertained jurisdiction in the case [5] and would not have reached the merits as it did. *Hicks v. Miranda, supra.*

The precedential impact of *Kimbell,* undoubtedly, would have been easier to ascertain if the New Mexico Supreme Court had written an opinion expressly treating the federal claim. But the unfortunate fact that appellate courts no longer have the luxury of writing an opinion in every case does not change settled precepts of appealability under § 1257(2), nor does it alter the rule of *Hicks v. Miranda.* Though the United States Supreme Court's summary disposition in *Kimbell* might not have the *same* precedential value as an opinion on the subject, *see Tully v. Griffin, Inc.,* — U.S. —, 45 U.S.L.W. 4013, 4015 (No. 75-831, Nov. 9, 1976), the reality is that the Supreme Court has already

5. *See, e.g., Street v. New York,* 394 U.S. 576, 581-83 (1969) (footnotes omitted):

> The New York Court of Appeals did not mention in its opinion the constitutionality of the "words" part of § 1425, subd. 16, par. d.. Hence, in order to vindicate our jurisdiction to deal with this particular issue, we must inquire whether that question was presented to the New York courts in such a manner that it was necessarily decided by the New York Court of Appeals when it affirmed appellant's conviction.
>
> . . .
>
> The issue whether a federal question was sufficiently and properly raised in the state courts is itself ultimately a federal question, as to which this Court is not bound by the decision of the state courts. However, it is not entirely clear whether in such cases the scope of our review is limited to determining whether the state court has "by-passed the federal right under forms of local procedure" of whether we should decide the matter "*de novo* for ourselves." *Ellis v. Dixon,* 349 U.S. 458, 463 (1955). In either event, we think appellant has met the burden of showing that the issue of the constitutionality of the "words" part of § 1425, subd. 16, par. d, was adequately raised in the state trial court.

determined the issue before us and we are bound by its determination. The Court determined that no substantial federal question was presented by a claim that state unemployment compensation for strikers is contrary to federal labor policy. Logically subsumed in that ultimate determination is a rejection of the substantive contention that federal labor policy precludes such compensation.

Appellants' third argument, that *Kimbell* is distinguishable,[6] is also unavailing. Appellants point out, quite correctly, that *Kimbell* involved unemployment compensation whereas this case concerns welfare benefits. Undoubtedly there is a distinction between these two forms of payments but, unfortunately for appellants, the distinction cuts the wrong way. Unemployment compensation provides a higher level of payment than welfare, intended not merely to provide subsistence but to replace lost earning power. As such, it is more economically disruptive of the collective bargaining balance than welfare, and it is less necessary in elemental human terms than welfare. But these considerations persuade us that this case follows *a fortiori* from *Kimbell:* a decision that labor policy does not preclude the payment of unemployment compensation to strikers necessarily subsumes a decision that labor policy does not preclude the payment of welfare benefits to strikers. The greater includes the lesser. Whether we say that *Kimbell* controls *ex proprio vigore,* or whether we say it controls by logical inclusion, the brute fact is that it controls. Accordingly, we reject the contention that New Jersey's welfare regulations are inconsistent with federal labor policy.

6. Appellants provided this court, immediately prior to oral argument, with a copy of the opinion of the United States District Court for the Eastern District of Michigan in *Dow Chemical Co. v. Taylor,* — F. Supp. — (E.D. Mich., Feb. 9, 1977). *Dow Chemical* acknowledged the precedential effect of *Kimbell* under *Hicks,* but distinguished *Kimbell* on the ground that the decision "may be directly dependent on the specific provisions of the New Mexico statute." *Ibid.* at —. Though paying *Kimbell* formal deference, such an analysis has the effect of robbing the Supreme Court's disposition of any real precedential vitality. At least in the absence of specific direction from the Supreme Court, we are not persuaded to take such a nugatory approach to the rule of *Hicks.*

III.

We also find no merit in the argument that New Jersey's payments made under the general Public Assistance program, N.J.S.A. 44:8-107 *et seq.*, and the Assistance to Families of The Working Poor, N.J.S.A. 44:13-1 *et seq.*, conflict with federal welfare policy, because the federal government plays no role in either program. In this appeal, we need not consider whether payments made to strikers under the Aid to Needy Families with Dependent Children of Unemployed Fathers program, 42 U.S.C. § 607, conflicts with federal welfare policy because New Jersey withdrew from that program effective June 20, 1971. Appellants' request for declaratory relief with respect to that program, therefore, is moot. While appellants' request for declaratory relief with respect to payments under the Assistance for Dependent Children program, N.J.S.A. 44:10-1 *et seq.*, is not moot, we are not persuaded by appellants' arguments on that score. We agree with the district court's careful analysis and conclusion that New Jersey's regulations are not inconsistent with federal welfare policy. — F. Supp. — (D. N.J. 1976).

The judgment of the district court will be affirmed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

CIVIL ACTION No. 853-71

SUPER TIRE ENGINEERING CO., ET AL., *Plaintiffs,*

v.

LLOYD W. McCORKLE, Commissioner of the Department of Institutions and Agencies of the State of New Jersey, ET AL., *Defendants.*

Order

(FILED MAY 14, 1976)

This matter having been brought before this court on Cross-Motions for Summary Judgment by plaintiffs, Super Tire Engineering Co., Gerard C. Smetana, Esq. and Herbert G. Keene, Jr., Esq., appearing, and defendants, McCorkle and Engelman, Stephen Skillman, Assistant Attorney General, appearing, joined by defendant-intervenor, Teamsters Local Union No. 676, Robert F. O'Brien, Esq., appearing, and defendant, Dicks, Martin F. McKernan, Jr., Esq., appearing, pursuant to Rule 56 of the Federal Rules of Civil Procedure, and the court having considered the briefs submitted, having heard the arguments of counsel, and due deliberation having been had thereon,

IT IS on this 10th day of May, 1976,

ORDERED that plaintiffs' Motion for Summary Judgment be and hereby is denied, and

IT IS FURTHER ORDERED that the Motion for Summary Judgment of the defendants McCorkle and Engelman be and hereby is granted and the plaintiffs' Complaint be and hereby is dismissed with costs.

/s/ JOHN F. GERRY
John F. Gerry, U.S.D.J.

UNITED STATES DISTRICT COURT,
D. NEW JERSEY.

Civ. A. No. 853-71.

SUPER TIRE ENGINEERING Co., et al., *Plaintiffs*,

v.

LLOYD W. McCORKLE, Commissioner of the Department of Institutions and Agencies of the State of New Jersey, et al., *Defendants-Appellees*.

April 29, 1976.

• • •

Opinion

GERRY, District Judge.

Pursuant to the regulations of the New Jersey Department of Institutions and Agencies,[1] workers who are engaged in lawful labor disputes and who are otherwise qualified are eligible for public assistance through New Jersey public welfare programs.[2] This action was filed on June 10, 1971 in this Court by two affiliated New Jersey corporations, Super Tire Engineering Co. and Supercap Corporation, and their president and chief executive officer alleging that the corporations' employees were striking and were receiving public assistance under these programs as administered by defendants, the New Jersey Commissioner of Institutions and Agencies, the Director of the Division of Public Welfare, the Director of the Camden County Welfare Board, and the Director of the Municipal Welfare De-

[1] Regulation M.A. 1.006 (revised March, 1957) provides in part:

"A. Citation of Statute and Constitution

"Chapter 156, P.L.1947 (R.S. 44:8-108) defines reimbursable public assistance as 'assistance rendered to needy persons not otherwise provided for under the laws of this State, where such persons are willing to work but are unable to secure employment due either to physical disability or inability to find employment.'

"The Constitution of New Jersey 1947, Article I, paragraph 19, guarantees that 'Persons in private employment shall have the right to organize and bargain collectively.'

"B. Interpretation and Policy

"It may be inferred from the quoted section of the statute that persons unwilling to work are ineligible for public assistance. However, for purposes of public administration, the phrase 'unwilling to work' must be defined as objectively as possible.

". . . The Constitutional guarantee of the 'right to organize and bargain collectively' implies the right of the individual to participate in a bona fide labor dispute as between the employer and the collective bargaining unit by which the individual is represented. Moreover, a 'strike,' when lawfully authorized and conducted, is recognized as an inherent and lawful element of the process of bargaining collectively and of resolving labor disputes. Accordingly, when an individual is participating in a lawful 'strike,' he may not be considered merely because of such participation, as refusing to work without just cause.

"C. Regulations

"Based on the foregoing statement of interpretation and policy, the following regulations are established:

• • • • • • • • • •

"4. No individual shall be presumed to be unwilling to work, or to be wrongfully refusing to accept suitable employment, merely because he is participating in a lawful labor dispute.

"5. An individual who is participating in a lawful labor dispute, and who is needy, has the same right to apply for public assistance, for himself and his dependents, as any other individual who is needy.

"6. In the case of an applicant for public assistance who is participating in a lawful labor dispute, there shall be an investigation of need and other conditions of eligibility, and an evaluation of income and resources, in the same way and to the same extent as in all other cases. In such instances, 'strike benefits' or other payments available to the individual from the labor union or other source, shall be considered a resource and shall be determined and accounted for."

[2] General Public Assistance Law, N.J.S.A. § 44:8-107 *et seq.* and Assistance to Families of the Working Poor, N.J.S.A. § 44:13-1 *et seq.*

(Footnote continued)

partment of the City of Camden.[3] Plaintiffs sought injunctive and declaratory relief against such eligibility claiming that the payment of public assistance to strikers was contrary to New Jersey law, to the federal policy promulgated by the Social Security Act of 1935,[4] and to the federal labor policy as provided for in the Labor Management Relations Act of 1947.[5] Before the case was tried, the labor dispute was settled, and the strike ended. The District Court dismissed the complaint pursuant to Rule 12(b)(6), F.R.C.P., ruling that the appropriate forum for plaintiff's claim was Congress and that the challenged regulations did not violate the Supremacy Clause. On appeal to the United States Court of Appeals for the Third Circuit, the action was remanded with instructions to vacate and dismiss the complaint as moot. 469 F.2d 911, 922 (3d Cir. 1972). The United States Supreme Court reversed and remanded for an adjudication on the merits of the controversy holding that declaratory relief was appropriate since the challenged state policies were ongoing and continued to affect the parties' collective bargaining relationship. *Super Tire Engineering Co.* v. *McCorkle*, 416 U.S. 115, 124-127, 94 S.Ct. 1694, 1699-1701, 40 L.Ed.2d 1 (1974). Cross motions for summary judgment have subsequently been filed by plaintiffs and the state defendants.[6] The sole legal issue for resolution by this Court is whether the New Jersey welfare regulation which provides that "no individual shall be pre-

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[3] The collective bargaining representative of Super Tire's employees, Teamsters Local Union No. 676, was granted leave to intervene as a defendant.

[4] 42 U.S.C. § 601 *et seq.*

[5] 29 U.S.C. § 141 *et seq.*

[6] The defendant union has filed a memorandum in opposition to plaintiff's motion for summary judgment, contending that an evidentiary hearing is mandated to determine the effect, if any, the payment of welfare benefits to strikers has upon the collective bargaining process.

sumed to be unwilling to work, or to be wrongfully refusing to accept suitable employment, merely because he is participating in a lawful labor dispute" is consistent with the applicable provisions of federal law.[7]

Both parties argue that the federal welfare policy supports their respective positions on the issue of whether federal law prohibits the payment of public assistance to strikers and their families. Since Congress has failed to explicitly delineate its position in this regard, a review of the legislative history of the Social Security Act of 1935 and its amendments, congressional action in related areas, and the relationship of the New Jersey regulations at issue to these developments is mandated.

One of the three major categorical public assistance programs established by the Social Security Act is Aid to Families with Dependent Children which is a joint federal-state program designed for needy children who have been "deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent" and who are living with one of a specified group of relatives. 42 U.S.C. § 606(a). "[P]rotection of such children is the paramount goal of AFDC." *King* v. *Smith*, 392 U.S. 309, 325, 88 S.Ct. 2128, 2137, 20 L.Ed.2d 1118, 1130 (1968). Although the initial AFDC program limited eligibility to needy children, in

---

[7] Although no allegation was made within their complaint, plaintiffs argue that the state regulation is violative of the equal protection clause of the Fourteenth Amendment in that needy strikers involved in collective bargaining disputes are eligible while those striking due to political and other fundamental beliefs are not. This Court finds that it is inappropriate to adjudicate the merits of this contention within the context of this conroversy. There is no basis in fact that plaintiffs have been so injured nor that such a determination has ever been made by the state welfare officials. Furthermore, the New Jersey state courts have not had an opportunity to decide whether such a practice would be in conformity with state law.

1950 Congress authorized the payment of benefits to also meet the needs of the caretaker relatives of these dependent children. 64 Stat. 551 (1950), (42 U.S.C. § 606(b)(1)). In order for either the dependent child or the adult caretaker relative to qualify for assistance, the need requirements set by the state must be met and the dependant child must be deprived of parental support by virtue of death, disability, or absence from the home. *See generally, King* v. *Smith,* 392 U.S. 309, 88 S.Ct. 2128, 20 L.Ed.2d 1118 (1968). These conditions to eligibility have been established by Congress, and a state electing to participate in this program is free to set its own standard of need and level of benefits, but it is not free to modify or supplement these eligibility requirements. *Townsend* v. *Swank,* 404 U.S. 282, 286, 92 S.Ct. 502, 505, 30 L.Ed.2d 448, 452-53 (1971); *Carleson* v. *Remillard,* 406 U.S. 598, 600, 92 S.Ct. 1932, 32 L.Ed. 2d 352 (1972).

The receipt of public assistance by families which included individuals who were on strike has been a practice in the United States throughout this century.[8] Under the Federal Emergency Relief Act of 1933, 73d Cong., Sess. I, Ch. 28-30, the predecessor of the categorical assistance provisions of the Social Security Act, benefits were paid to strikers. See also Bureau of Social Science Research, Inc., *Legislative History of the Aid to Dependent Children Program,* 12-16 (1970). In 1933, Congress provided striking workers of the railroad industry with benefits under specified conditions pursuant to the Railroad Employment Insurance Act, 45 U.S.C. §§ 351 et seq., 354(a-2)(iii). Striker eligibility under the Unemployment Compensation Act of 1935, 42 U.S.C. § 501 et seq., was deferred by Congress to each state. *See* 79 Cong. Rec. 5782, 9284 (1935) (Remarks of Congressmen Cooper and Wagner), Under the Food Stamp Act, 7 U.S.C. § 2011, *et seq.*, which is a coordinated

[8] The first litigation over such payments was in 1904, *City of Spring Valley* v. *County Bureau,* 115 Ill. App. 545.

program with AFDC,[9] otherwise eligible strikers are qualified to participate. An effort in 1970 to exclude their participation was rejected. 7 U.S.C. § 2014(e). Similarly, congressional attempts to prohibit AFDC benefits to eligible strikers have been defeated. In 1972, the administration introduced legislative proposals which contained an explicit provision to deny strikers benefits under the AFDC program. Senate Report No. 92-1230, 92d Cong., 2d Sess. 108, 472-73 (1972). This modification was debated on the Senate floor but deleted prior to the vote. 118 Cong. Rec. 16815, 17049-17052. Likewise, three bills which sought to amend the Social Security Act in order to proscribe AFDC-U benefits for strikers were introduced in the House of Representatives in 1973, but they were not passed. H.R. 9422, 9748, 9903, 93d Cong., 1st Sess. (1973).

Although Congress has amended the Social Security Act numerous times since 1935,[10] and has reconsidered and modified the original conditions to AFDC eligibility,[11] it has not excluded strikers and their families from the program. Plaintiffs argue that these subsequent amendments to AFDC eligibility implicitly excluded striking workers by contending that a person engaged in an economic strike has terminated his employment without good cause as is

[9] 7 C.F.R. § 271.3.

[10] See 53 Stat. 1379 (1939), 64 Stat. 549 (1950), 70 Stat. 848 (1956), 72 Stat. 1048 (1958), 75 Stat. 75 (1961), 76 Stat. 185 (1962), 79 Stat. 414 (1965), 81 Stat. 877 (1968), 85 Stat. 802 (1971), 86 Stat. 1485 (1972).

[11] 75 Stat. 75 (1961) extended A.F.D.C. benefits to two-parent families in which the father was unemployed. The revised statute reads that "the term 'dependent child' shall . . . include a needy child . . . who has been deprived of parental support or care by reason of the unemployment (as determined in accordance with standards prescribed by the Secretary) of his father . . ." 42 U.S.C. § 607(a). This program is not obligatory upon the states. 81 Stat. 877 (1968) required A.F.D.C. recipients to participate in work training programs and to seek employment.

mandated by 42 U.S.C. §§ 602(a)(19)(F), 607(b)(1)(B), and is not an unemployed individual within the context of the Social Security Act. It is difficult for this Court to conclude that Congress, fully aware of the fact that strikers were receiving welfare benefits under the Act, intended by its silence on the issue to terminate that practice. Even so, these amendments do not implicitly exclude strikers, otherwise qualified, from receiving welfare benefits.

The good cause requirement within the Act speaks to an employable individual's rejection of an offer of employment or training. Nothing in the New Jersey regulations relieves a striker of any of the eligibility requirements which must be met by others. A striker must register for work and accept an offer of employment other than the job at issue in the strike. 42 U.S.C. § 602(a)(8)(C)(ii). *See also Super Tire Engineering Co.* v. *McCorkle,* 416 U.S. at 132, n. 4, 94 S.Ct. at 1703, 40 L.Ed.2d at 14 (Stewart, J., dissenting); *Francis* v. *Davidson,* 340 F.Supp. 351, 366-67 (D.Md. 1972), *aff'd* 409 U.S. 904, 93 S.Ct. 223, 34 L.Ed.2d 168 (1972). The New Jersey regulation does not declare that an economic strike is good cause for terminating employment nor that it is prohibited conduct sanctioned by ineligibility for public assistance. Rather, Regulation MA 1.006(c), as explained in its policy statement, simply removes any presumption of ineligibility of an individual due to the exercise of his federally protected right to strike.[12] *See also Strat-O-Seal Mfg.* v. *Scott,* 72 Ill.App.2d 480, 218 N.E.2d 227 (1966). As the court in *ITT* v. *Minter,* 435 F.2d 989, 994 (1st Cir. 1970), *cert. denied* 402 U.S. 933, 91 S.Ct. 1526, 28 L.Ed.2d 868 (1971), *reh. denied* 404 U.S. 874, 92 S.Ct. 27, 30 L.Ed.2d 120 (1971), observed, it is "no

[12] This observation is not to insinuate that a case-by-case evaluation of striking disputes is appropriate. *See General Electric Co.* v. *Callahan,* 294 F.2d 60 (1st Cir. 1961), *appeal dismissed* 369 U.S. 832, 82 S.Ct. 851, 7 L.Ed.2d 840 (1962), in which an activity compelilng a state administrator to take sides in a labor dispute was determined to be impermissible.

less circular or more persuasive" to equate such refusals to work with fault and the absence of good cause as it is to assume that the exercise of one's right to strike constitutes good cause. As the Senate Finance Committee's Report makes clear,[13] the issue of good cause is a decision left to the states, and New Jersey has determined to treat otherwise eligible strikers as all other eligible citizens, refusing to discriminate against a needy person solely on the genesis of that need. *State ex rel. Executive Committee International Union* v. *Montana State Dept. of Public Welfare,* 136 Mont. 283, 347 P.2d 727, 738 (1959). At a minimum, contrary to plaintiff's assertions, the federal provisions prohibiting welfare payments to persons who have terminated or refused employment without good cause do not conclusively and automatically exclude strikers from receipt of such benefits.

Additionally, plaintiffs argue that congressional intent to exclude strikers from receiving benefits under the Social Security Act is evidenced by the concept of unemployment introduced into the Act with the creation of the AFDC-U program.[14] Pointing to the purpose of the AFDC-U program as a means of permitting the involuntary unemployed who meet the other eligibility requirements to participate in the AFDC program,[15] plaintiffs contend that strikers were thereby excluded from receiving such assistance. Whether Congress has defined unemployment accordingly

[13] Senate Committee on Finance, Rep. No. 165, 87th Cong. 1st Sess., p. 3 (1961); U.S. Code Cong. and Admin. News, pp. 1716, 1718.

[14] It should be noted that New Jersey withdrew from AFDC-U in 1971.

[15] The Senate Finance Committee Report indicates that the program's purpose is "to assist children who are in need because of unemployment of a parent" as is done with children in need because of a parent's death, absence or incapacity. U.S. Code Congressional & Administrative News, 87th Cong., 1st Sess., p. 1716 (1961).

is not clear as is evidenced by the series of cases within the Fourth Circuit as to the meaning of unemployment and to the issue of whether a national definition was congressionally mandated. In *Francis* v. *Davidson*, 379 F.Supp. 78, 81-82 (D.Md. 1974), *aff'd sub. nom., Francis* v. *Chamber of Commerce*, 529 F.2d 515 (4th Cir., 1975), the court determined that the Secretary of Health, Education and Welfare was directed to promulgate a national definition of unemployment to which participating states would be required to adhere in administrating their programs. Under the regulation originally issued by HEW, 45 CFR § 233.100 (a)(1)(i), the Secretary required each participating state to include all fathers, who were otherwise qualified, who were employed less than a given number of hours.[16] Therefore, those persons who were out of work because of a labor dispute and who had met all other eligibility criteria were entitled to AFDC-U assistance if their state had chosen participate. *Francis* v. *Davidson*, 340 F.Supp. 351 (D.Md. 1972), *aff'd* 409 U.S. 904, 93 S.Ct. 223, 34 L.Ed.2d 168 (1972).[17] Neither the language of the amendment nor its legislative history indicate a congressional intent to define unemployment as excluding those out of work due to

[16] 45 C.F.R. § 233.100(a), as promulgated in 1969, provided in part:

§ 233.100 Dependent children of unemployed fathers.

(a) Requirements for State Plans. If a State wishes to provide AFDC for children of unemployed fathers, the State plan under Title IV—Part A of the Social Security Act must, except as specified in paragraph (b) of this section:

(1) Include a definition of an unemployed father

(i) Which shall include any father who is employed less than 30 hours a week, or less than three-fourths of the number of hours considered by the industry to be full time for the job, whichever is less, . . .

[17] Accordingly, the Maryland regulation denying AFDC-U benefits to those unemployed because of a labor dispute was held invalid as inconsistent with federal regulatory requirements. *Francis* v. *Davidson, supra* at 368.

a labor dispute.[18] Rather, Congress directed the Secretary of HEW to determine the criteria which would render people unemployed for purposes of the AFDC-U program. 42 U.S.C. § 607(a); *Francis* v. *Davidson*, 379 F.Supp. at 81-82. The Secretary has acted accordingly, and the existing valid regulation does not preclude those out of work because of a labor dispute.

The Social Security Act has not explicitly addressed itself to strikers and their eligibility for public assistance under the Act. However, strikers have consistently received benefits under these and similar federal welfare legislation, and New Jersey has accordingly permitted such payments.[19] Specific proposals which would have terminated these payments have been repeatedly rejected by Congress, and an examination of eligibility amendments to the Act has not revealed any indirect prohibition of them. Therefore, this Court deems it inappropriate to assume a legislative function and cannot conclude that the New Jersey regulations at issue are inconsistent with the federal welfare policy.

However, plaintiffs urge this Court to impute such congressional intent concerning the payment of welfare benefits to strikers from the Labor Management Relations Act, 29 U.S.C. § 141 *et seq.* Plaintiffs do not refer to any specific provision of the N.L.R.A. prohibiting striker eligibility but contend that such eligibility alters the relative economic strength of the parties thereby frustrating the national

[18] In fact, Congressman Mill's response to this question indicates congressional awareness that the Amendment's terminology would not exclude those unemployed due to a labor dispute. 107 Cong. Rec. 3766 (1961).

[19] Under 42 U.S.C. § 1316, the Secretary of HEW is charged with the responsibility of periodically reviewing state policies to make a determination as to whether the plan conforms with the provisions an. policies of the Social Security Act.

labor policy of free collective bargaining.[20] It is difficult for this Court to imbue congressional silence in both the Social Security Act and the N.L.R.A. with such significance. If in fact the national labor policy and the national welfare policy are irreconcilable, we would doubt, as did the First Circuit in *ITT* v. *Minter, supra* at 994, that Congress would be unaware of such a conflict and would have failed to address itself to the problem. *See also Almacs, Inc.* v. *Hackett,* 312 F.Supp. 964, 968 (D.R.I. 1970). This conclusion is particularly compelling in light of Congress' refusal to prohibit such payments by amending the major public assistance programs of the Social Security Act.

In fact, a review of the only congressional action in this regard, the Food Stamp Act Amendment of 1970, would infer a contrary conclusion. In 1970, Congress rejected proposals to disqualify strikers from the Food Stamp Program and amended the statute to expressly approve their eligibility.[21] The reason given by the House Committee on Agriculture was their determination not "to take sides in labor disputes."[22] Congress viewed the maintenance of

[20] The extent to which the payment of *unemployment* compensation to strikers may or may not conflict with the policy of the N.L.R.A. is clearly distinguishable from the issue here. As noted by the Court in *Grinnell Corp.* v. *Hackett,* 475 F.2d 449, 459 (1st Cir. 1973), *cert. denied* 414 U.S. 858, 94 S.Ct. 164, 38 L.Ed.2d 108 (1973), the state interests in and the funding mechanisms of unemployment compensation and welfare assistance are not the same, requiring a separate consideration of their reconcilability with federal labor policy.

[21] 7 U.S.C. § 2014(c) provides that the "refusal to work at a plant or site subject to a strike or a lockout for the duration of such strike or lockout shall not be deemed to be a refusal to accept employment."

[22] The House Committee on Agriculture reported that

> The committee debated at length the question of striker participation in the Food Stamp Program; it rejected a provision which would have automatically made strikers ineligible for food stamps. In lieu of such a provision the committee adopted language which clearly states that no person (neither a striker nor a nonstriker) need accept employment or training at a struck plant or site. The committee does not wish to take sides in labor disputes and does not believe this bill is the proper place to solve labor-management problems. The Secretary, through regulation, is free to establish whatever requirements he deems appropriate as to the method and time for strikers to register for employment or training at facilities not subject to a strike.

House Rep. No. 91-1402, 91st Cong., 2d Sess., p. 11 (1970), U.S. Code Cong. & Admin. News 1970, pp. 6025, 6035.

government neutrality in labor disputes contingent upon the refusal of government to treat otherwise eligible strikers differently from non-strikers in securing public assistance. At the very least, it may be concluded that Congress has not perceived these subsistence payments as an infringement upon the collective bargaining process. In light of this congressional perception of the interaction of the federal welfare system with that of the national labor policy, this Court cannot conclude that New Jersey's refusal to disqualify strikers from their assistance programs is a frustration of the federal labor law's full effectiveness and thereby in violation of the Supremacy Clause of the Constitution.

Having concluded that the New Jersey regulations are not inconsistent with federal welfare and labor policies, an evidentiary hearing is not required, and the state defendants' motion for summary judgment is granted. Plaintiff's motion for summary judgment is denied.

Counsel are directed to submit an appropriate order.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. .....

KIMBELL, INC., d/b/a FOODWAY, FURR'S, INC., SAFEWAY STORES, INC., and SHOP RITE FOODS, INC., d/b/a PIGGLY WIGGLY, *Appellants,*

vs.

EMPLOYMENT SECURITY COMMISSION OF THE STATE OF NEW MEXICO and
LANA JEAN NOLAN, *et al., Appellees.*

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW MEXICO

Motion of Appellee To Dismiss Appeal

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I

The Question Presented Does Not Raise a Substantial Federal Question of Preemption Sufficient for This Court To Take Jurisdiction

The New Mexico Supreme Court, in its controlling opinion in the associated cause of *Albuquerque-Phoenix Express, Inc.* v. *Employment Security Commission, supra,* Appendix, p. 11a, considered the federal question of preemption raised before this Court by Appellants and decided, based upon its interpretation of state law as applicable to the particular facts of this case, that no substantial question of interference with federal labor law policy existed, and that under its interpretation, the administration of the State unemployment compensation law did not conflict with the preemption rule set down by this Court in *San Diego Building Trades Council* v. *Garmon,* 359 U.S. 236 (1959) or *Motor Coach Employees* v. *Lockridge,* 403 U.S. 274 (1971). It is not entirely clear from the New Mexico Supreme Court's rejection of the rational expressed by the District Court in *Hawaiian Telephone Co.* v. *State Department of Labor & Industrial Relations,* 405 F. Supp. 275 (D. Hawaii 1975), whether it was deciding that, under its interpretation of the New Mexico statutes, there was no conflict between the state administration of unemployment compensation and federal labor policy as a matter of law, or whether it was adopting the balancing of state versus federal interests approach exhaustively developed by the First Circuit Court of Appeals in *Grinnell Corp.* v. *Hackett,* 475 F.2d 449 (1st Cir., 1973) *cert. denied,* 414 U.S. 858 (1973). Whether the New Mexico Court meant to say that, under the particular facts of this case the issue was exclusively one of state law interpretation and raised no colorable federal question or that the potential interference with federal labor policy was too remote and tangential to outweigh state interest, its opinion would appear sustainable and would not, under established principle of U. S. Supreme Court review, give rise to assumption of jurisdiction by this Court.

It is important to note that, in its controlling opinion in *Albuquerque-Phoenix Express, Inc.* v. *Employment Security Commission, supra,* the New Mexico Supreme Court was not going beyond the facts of these two cases which, for purposes of the federal question presented on appeal to this Court were virtually identical. Unlike the Rhode Island statute [sic] which this Court was addressing in *Super Tire Engineering Co.* v. *McCorkle,* 416 U.S. 115 (1974), the New Mexico law, like a majority of the States' laws, does not provide for payment of benefits to strikers after a fixed period of disqualification. The general rule under New Mexico law is that claimants are disqualified from receipt of benefits for the duration of their unemployment resulting from a labor dispute which causes a substantial stoppage of work at their place of employment. As indicated in the record, the Employment Security Commission of New Mexico has allowed payment of unemployment compensation benefits to strikers in only three cases in its history, including the two cases discussed in this appeal, and only under facts similar to those present in this case where there has been no appreciable impact from the strike on the employers' continued business operations. In contrast to the Rhode Island law [sic], the interpretation by the New Mexico Supreme Court of the New Mexico unemployment compensation statutes provides no fixed or definite policy of payment of benefits to strikers, nor allows any expectations of such payment upon which employees could reasonably predicate labor dispute strategy. In fact, the interpretation by the New Mexico Supreme Court as to when benefit payments to strikers . . . .

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1684

SUPER TIRE ENGINEERING CO., SUPERCAP CORPORATION and A. ROBERT SCHAEVITZ,

Petitioners,

vs.

LLOYD W. McCORKLE, Commissioner of the Department of Institutions and Agencies of the State of New Jersey, et al.,

and

TEAMSTERS LOCAL UNION NO. 676, a/w INT'L. BHD. OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

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SUPER TIRE ENGINEERING CO., SUPERCAP CORPORATION and A. ROBERT SCHAEVITZ,

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LLOYD W. McCORKLE, Commissioner of the Department of Institutions and Agencies of the State of New Jersey, et al.,

and

TEAMSTERS LOCAL UNION NO. 676, a/w INT'L BHD. OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

COUNTERSTATEMENT OF ISSUES PRESENTED

1. Do the provisions of the Social Security Act governing the federal categorical assistance programs indicate a congressional intention to disqualify families which include strikers from receiving benefits even though they satisfy every express statutory condition of eligibility?

2. Is it appropriate to look to the general provisions of the National Labor Relations Act to find the intention of Congress concerning the payment of welfare to families which include strikers where the conditions of eligibility for the federal categorical assistance programs are set forth specifically and comprehensively in the Social Security Act?

COUNTERSTATEMENT OF THE CASE

On June 10, 1971, two affiliated New Jersey corporations, Super Tire Engineering Company and Supercap Corporation (referred to hereinafter as "Super Tire"), and their President and Chief Executive Officer, filed suit in the United States District Court for the District of New Jersey alleging that the employees of Super Tire were on strike and that many of the strikers were receiving public assistance under laws of the State of New Jersey. The complaint claimed, *inter alia*, that the payment of public assistance to strikers is contrary to the provisions of the Federal Social Security Act governing the Aid to Families with Dependent Children program (hereinafter "AFDC") (42 U.S.C. §601, *et seq.*) and that it conflicts with the provisions of the Labor Management Relations Act of 1947 guaranteeing free collective bargaining (29 U.S.C. §141, *et seq.*). The named defendants in the original complaint were the New Jersey Commissioner of Institutions and Agencies and the Director of the Division of Public Welfare, who are the administrative officials responsible for the State's welfare programs, and a county and municipal welfare official.* Subsequently, the collective bargaining representative for Super Tire's employees, Teamsters Local Union No. 676, was granted leave to intervene as a defendant.

The matter was brought before the District Court on June 24, 1971 on the motion of Super Tire for a preliminary injunction. On the return date the defendant State officials filed a motion to dismiss the complaint for failure to state a cause of action, which was granted.

An appeal was then taken by Super Tire to the Third Circuit Court of Appeals which, with Judge Gibbons dissenting, dismissed the appeal as moot because the strike out of which it arose had ended and directed the District Court to dismiss the complaint. *Super Tire Engineering Company v. McCorkle, et al.*, 469 F.2d 911 (3rd Cir. 1972).

Super Tire then filed a petition for writ of certiorari, which was g.anted. The Court reversed the judgment of the Third Circuit and remanded for further proceedings, holding that the case was not moot insofar as the complaint sought a declaratory judgment that the payment of welfare benefits to strikers is inconsistent with federal law. *Super Tire Engineering Company v. McCorkle*, 416 U.S. 115 (1974).

The matter was thereafter remanded to the District Court. Cross motions for summary judgment were

* The Attorney General of New Jersey represents only the two State officials. The county and municipal welfare officials have not participated actively in the litigation.

filed in the District Court and on April 29, 1976, the District Court issued a written opinion which concluded that the pertinent federal welfare statutes do not disquality strikers and their families from receiving welfare benefits for which they otherwise qualify. *Super Tire Engineering Company v. McCorkle*, 412 F. Supp. 192 (D.N.J. 1976) (Pet App. pp. 16a-27a).*

An appeal was then taken to the Third Circuit Court of Appeals, which affirmed. *Super Tire Engineering Company v. McCorkle*, 550 F.2d 903 (3rd Cir. 1977) (Pet. App. pp. 3a-14a). It concluded that insofar as the plaintiff's claim was predicated on federal labor law, it was foreclosed, pursuant to *Hicks v. Miranda*, 422 U.S. 332, 344 (1975), by the summary affirmance in *Kimbell, Inc. v. Employment Security Commission*, 429 U.S. 804 (1976). It also affirmed the conclusion of the District Court that families which include strikers are not automatically disqualified from receiving benefits under the program of Aid to Families with Dependent Children (42 U.S.C. §601, *et seq.*) (hereinafter "AFDC") if they are otherwise qualified. Finally, the Third Circuit refused to consider whether families which include strikers may receive benefits under the Aid to Needy Families with Dependent Children of Unemployed Fathers program (42 U.S.C. §607) (hereinafter "AFDC-UF"), since the New Jersey Legislature had repealed the enabling legislation for participation in this program, effective June 20, 1971. L. 1971, c. 210.**

* This notation refers to the appendix to the petition for writ of certiorari.

** After the Third Circuit issued its decision, the New Jersey Legislature enacted legislation to restore New Jersey's participation in the AFDC-UF program, effective July 1, 1977. L. 1977, c. 127.

ARGUMENT

The court should deny the Petition for a Writ of Certiorari, because the District Court and Court of Appeals correctly concluded that the provisions of the Social Security Act, which deal comprehensively with conditions of eligibility under the federal categorical assistance programs, do not prohibit the payment of welfare benefits to families which include strikers.

This petition seeks review of a final judgment of the Third Circuit Court of Appeals interpreting the provisions of the Social Security Act establishing the AFDC program, as they relate to the payment of benefits to families which include strikers, and the impact, if any, of the National Labor Relations Act (hereinafter "NLRA") upon the interpretation of those provisions.

The AFDC program provides financial aid on a joint federal-state basis for needy children who have been "deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent" and are living with any one of a specified group of relatives. 42 U.S.C. §606(a). See generally *King v. Smith*, 392 U.S. 309 (1968). As originally enacted, the benefits of the AFDC program were limited to needy children themselves. 49 Stat. 629 (1935). By a 1950 amendment, benefits also may be paid to meet the needs of the caretaker relative of a dependent child. 64 Stat. 551 (1950). Neither the original Act nor the 1950 amendment conditioned eligibility for AFDC benefits for either dependent children or their relatives on whether they were employed or available for work. The only criteria for eligibility were that (1) a dependent child had been deprived of the

support of a parent by virtue of death, disability or absence from the home, and (2) the need requirements set by the State had been met. In short, the availability of AFDC benefits revolves solely around the *needs* of eligible families.

Consistent with these objectives, there is no suggestion in the legislative history that Congress intended to establish any barrier to the receipt of benefits by families which include individuals who are on strike. While there was no specific discussion of this subject at the time of enactment of the original legislation, the problem was not one of which congressmen in the 1930s would have been unaware. It is clear that benefits had been paid to strikers under the Federal Emergency Relief Act of 1933, which was the immediate predecessor of the categorical assistance provisions of the Social Security Act (see Bureau of Social Science Research, Inc., Legislative History of the Aid to Dependent Children Program 12-16 (1970)), and that such payments had been the subject of considerable controversy during the period immediately preceding enactment of the Social Security Act. See A. Thieblot and R. Cowin, Welfare and Strikes: The Use of Public Funds to Support Strikers, 34-36 (1972). Furthermore, the Railroad Employment Insurance Act (45 U.S.C. §451, *et seq.*), enacted in 1933, provided compensation for strikers under specified conditions. 45 U.S.C. §354(a-2)(iii).

If Congress had desired to prohibit this practice under the categorical assistance provisions of the Social Security Act of 1935, it could easily have inserted a provision to this effect. Instead, it limited the conditions of eligibility to need alone. Similarly, if Congress had desired to prohibit payments to strikers under the Unemployment Compensation Act (42 U.S.C. §1304), also enacted in 1935, it could have done so. Instead, it elected to confer substantial discretion upon the states to determine their own conditions of eligibility. *Cf. Ohio Bureau of Employment Services v. Hodory*, 45 Law Week 4544, 4547-4549 (decided May 31, 1977). Finally, the NLRA, also enacted in 1935, established a comprehensive statutory code for industrial relations, but Congress was silent with respect to the payment of public funds to strikers. It thus appears that in enacting the NLRA, the Unemployment Compensation Act and the AFDC provisions of the Social Security Act in 1935, Congress had ample opportunity to enact a prohibition against the payment of public funds to strikers, but it refrained from doing so and thereby permitted such payments to be paid. A. Thieblot and R. Cowin, *supra* at 36-43.

The AFDC provisions of the Social Security Act were amended numerous times after 1935. See generally, Bureau of Social Science Research, Inc., *supra* at 89-267. Several of these amendments would have provided appropriate occasions for the insertion of a prohibition against the payment of welfare benefits to strikers if Congress had been so minded. In 1950, the benefits of the AFDC program, previously limited to needy, dependent children, were extended to the relatives caring for such children, thus making such benefits available to adults for the first time. Congress could have then enacted a prohibition against the payment of benefits to strikers but, consistent with its basic humanitarian objective to provide minimal support not just for dependent children but also their caretaker relatives (see Bureau of Social Science Research, Inc., *supra* at 159-160), the amendment was silent on the subject. In 1961,

the AFDC program, which previously had required as a condition of eligibility that one parent be dead, disabled or absent from the home, was extended to two-parent families in which the father was unemployed by the enactment of enabling legislation for what has come to be called the AFDC-UF program. See generally, *Batterton v. Francis*, 45 Law Week 4768 (decided June 20, 1977). This would have been an obvious occasion for Congress to address the subject of welfare benefits for strikers, since the 1961 amendment made federal categorical assistance benefits potentially available to a large number of labor organization members who theretofore would not have met the conditions for eligibility. But again, the amendment was silent on the subject. Finally, in 1967 Congress enacted a detailed set of amendments which require certain AFDC recipients to participate in work training programs and to seek employment. See generally, *New York State Department of Social Services v. Dublino*, 413 U.S. 405 (1973). Although this amendment added a provision requiring the states to disregard the needs of specified recipients who refuse without cause to accept employment, no similar exclusion was provided with respect to strikers. In short, despite continuous congressional reconsideration of the conditions for AFDC eligibility, no attempt was made prior to 1972 to exclude the families of strikers from the program.

The common understanding which has evolved during the course of the legislative history of the AFDC program, that strikers are eligible for its benefits, is also reflected in recent congressional action to enact a prohibition against the payment of such benefits. In 1972, the Nixon Administration introduced welfare reform legislation which, as reported out by the Senate Finance

Committee, contained an explicit provision to deny strikers benefits under the AFDC program. Senate Report No. 92-1230, 92nd Cong., 2d Sess. 108, 472-473 (1972). This proposal was debated on the Senate floor (118 Cong. Rec. 16815, 17049-17052) but was deleted before the bill was voted upon. *Id.* at 16815. In addition, three bills which sought to amend the Social Security Act to prohibit the payment of benefits to strikers under the AFDC-UF program were introduced in the House of Representatives in 1973, but they were not passed. H.R. 9422, 9748, 9903, 93d Cong., 1st Sess. (1973). Most significantly, an attempt to exclude strikers from the food stamp program, which is closely interrelated with the AFDC program (see 7 C.F.R. §271.3), was not only defeated, but resulted in the enactment of 7 U.S.C. §2014(c), which expressly provides:

> ". . . Refusal to work at a plan or site subject to a strike or a lockout for the duration of such strike or lockout shall not be deemed to be a refusal to accept employment."

Thus, the only recently enacted amendment concerning public aid to strikers was premised on the congressional view that government neutrality in labor disputes can only be maintained if strikers are afforded the same opportunity as nonstrikers to secure such benefits.

In short, it is clear not only from the face of the statute but also the pertinent legislative history that Congress did not intend to disqualify otherwise eligible families from participating in the AFDC program simply because a member of the family is out of work due to a strike. Rather, the only conditions for basic eligibility in the AFDC program are that (1) a dependent child has been deprived of the support of a parent by virtue

of death, disability or absence from the home, and (2) the need requirements set by the State have been met. 42 U.S.C. §606(a). If these conditions are satisfied, eligibility is established and benefits must be paid by the State. As the court noted in *Burns v. Alcala*, 420 U.S. 575, 578 (1975):

> "[F]ederal participation in state AFDC programs is conditioned on the State's offering benefits to all persons who are eligible under federal standards. The State must provide benefits to all individuals who meet the federal definition of 'dependent child' and who are 'needy' under state standards, unless they are excluded or aid is made optional by another provision of the Act."

Therefore, in view of the fact that the conditions of eligibility to receive AFDC benefits are comprehensively delineated by the Social Security Act, which in no way even suggests that eligibility to receive benefits turns on whether a recipient is on strike, the conclusion is inescapable that Congress has not prohibited strikers from receiving welfare benefits.

In urging that this case nevertheless presents an important question of federal law which needs to be settled by the Court, the petition for writ of certiorari engages in an extended discussion of the meaning of "unemployment" in the section of the statute governing the AFDC-UF program. 42 U.S.C. §607(a). However, the Court has issued a full-length opinion within the last week interpreting the meaning of "unemployment" in this section. *Batterton v. Francis, supra.* Therefore, it no longer can be said that this issue has not been addressed by the Court. Furthermore, even assuming there were a need for further interpretation of the meaning of "unemployment" in 42 U.S.C. §607(a), this case would not present a suitable context for such interpretation. As noted in the opinion of the Third Circuit, New Jersey withdrew from the AFDC-UF program in June of 1971. Accordingly, neither the District Court nor the Court of Appeals addressed themselves to the meaning of 42 U.S.C. §607(a). It is of course well established that this Court ordinarily will consider only issues which have been properly presented to and decided by the lower federal courts. *Tennessee v. Dunlap*, — U.S. —, 96 S.Ct. 2099, 2101 n.2 (1976). Therefore, this would be a peculiarly inappropriate case for the Court to consider any further question which may exist as to the meaning of 42 U.S.C. §607(a).

The recent decision in *Batterton v. Francis, supra*, also demonstrates that the petition does not present any other substantial federal question. In considering whether families which include strikers may be disqualified from receiving benefits under the AFDC-UF program, the Court looked solely to the provisions of the Social Security Act governing that program. This analysis strongly reinforces the conclusion that the Social Security Act provides an all inclusive, self-contained set of criteria for eligibility in the federal categorical assistance programs. The decision thereby negates the petitioners' claim that the federal labor laws impliedly impose additional grounds of eligibility by which welfare recipients who satisfy every condition of the Social Security Act still may be disqualified from receiving benefits. Therefore, insofar as the petition relies upon federal labor law, it is simply lacking in substance.

CONCLUSION

It is respectfully submitted that for the foregoing reasons the petition for writ of certiorari should be denied.

Respectfully submitted,

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Attorney for Respondents,
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STEPHEN SKILLMAN
Assistant Attorney General
Of Counsel and On the Brief

No. 76-1684

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

SUPER TIRE ENGINEERING COMPANY;
SUPERCAP CORPORATION; and
A. ROBERT SCHAEVITZ,
Petitioners,

vs.

LLOYD W. McCORKLE;
and
TEAMSTERS LOCAL UNION NO. 676,
Respondents.

On Petition For a Writ of Certiorari To The United States Court of Appeals For The Third Circuit

MEMORANDUM IN LIEU OF BRIEF ON BEHALF OF TEAMSTERS LOCAL UNION NO. 676, RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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In The

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1884

SUPER TIRE ENGINEERING COMPANY;
SUPERCAP CORPORATION; and
A. ROBERT SCHAEVITZ,
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vs.

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MEMORANDUM IN LIEU OF BRIEF ON BEHALF OF TEAMSTERS LOCAL UNION NO. 676, RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The questions presented by the employer's Petition for Certiorari are not appropriate for review by this Court under the guidelines set down in Rule 19 of this Court's Rules. One of the "Questions Presented" by the Petitioner does not in fact indicate the real substance of the dispute between the parties in this case. At no time in the lengthy litigation involving the issue of whether striking employees may receive welfare bene-

fits from the State of New Jersey has there been any determination or pronouncement by the State that employees are eligible for welfare benefits "solely from their being on strike" as alleged by Petitioner in its "Questions Presented" portion of the Petition. Rather the eligibility regulations of New Jersey, being attacked by Petitioner-Employer over the last six years of this litigation, are those which provide that simply being "on strike" is not cause to disqualify an individual from being considered for welfare assistance. Mr. Justice Stewart in his dissent when this case was previously before the Court noted that "[f]or one thing, New Jersey does not automatically extend welfare benefits to striking workers; it merely makes them *eligible* to receive such benefits, provided they meet all other appropriate criteria." *Super Tire Engineering Company v. McCorkle*, 416 U.S. 115, 132, n. 4 (1974) (emphasis in original).

It is the Respondent-Union's strongly felt position that this Court in dismissing the appeal of *Kimbell Inc. v. Employment Security Commission of New Mexico*, ____N.M.____, Civil No. 10247 (Sup.Ct. N.M., 1975) for lack of a substantial federal question, 429 U.S. 804 (1976) effectively disposed of the issue raised by Petitioner herein involving unemployment compensation for strikers. In reviewing Petitioner's claim on remand from this Court, the Third Circuit followed the doctrine expressed by this Court in *Hicks v. Miranda*, 422 U.S. 332, 334 (1975) in holding that:

> We can only conclude that, when the Supreme Court dismissed for want of a substantial federal question in *Kimbell*, the necessary predicate for that dismissal was a determination that federal labor policy did not preclude the payment of unemployment compensation to strikers. That determination controls the labor policy aspect of this case.

Super Tire Engineering Company v. Lloyd W. McCorkle, 550 F. 2d 903, 906 (3d Cir. 1977). These dispositions effectively control the fate of the Petitioner.

Finally, it should be pointed out that this decision of the Court of Appeals for the Third Circuit does not involve a conflict with other courts of appeals nor has the Third Circuit decided the matter in any way in conflict with the applicable decisions of this Court. The federal district court and now the Court of Appeals for the Third Circuit have both taken all necessary action to make a determination "on the merits" in *Super Tire* as mandated by the April 16, 1974 decision of this Honorable Court. It is further suggested that there is no longer existent any important question of federal law not disposed of by this Court in its *Kimbell* decision.

Under all of the facts to be considered by the Court under Rule 19, it is suggested none militate strongly for review in this case. For these reasons it is respectfully requested that the Petition for Certiorari be denied.

Respectfully submitted,
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SIMONOFF & ADOURIAN
Attorneys for Respondent—
Teamsters Local 676
By: ROBERT F. O'BRIEN

No. 76-1684

IN THE

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v.

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and

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On Petition For A Writ of Certiorari To The United States Court Of Appeals For The Third Circuit

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PETITIONERS' REPLY TO BRIEF IN OPPOSITION

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On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

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PETITIONERS' REPLY TO BRIEF IN OPPOSITION

In his Brief in Opposition, Respondent Lloyd W. McCorkle misconceives the Court's ruling in *Richard A. Batterton, etc.* v. *Robert Francis, etc.*, —— U.S. ——, (No. 75-1181) (June 20, 1977), ignores the affirmative burden of benefit entitlement imposed upon all

welfare claimants under the Aid For Dependent Children (AFDC) program by the Court in *Burns* v. *Alcala*, 420 U.S. 575 (1975), and misinterprets Congressional intent in enacting and amending both the AFDC and Aid For Dependent Children-Unemployed Father (AFDC-UF) programs.

These contentions require response so that the Court can consider the proper statutory, legislative, and decisional framework which render the issues presented in this case so important to federal welfare and labor policy.

ARGUMENT

1. THE COURT'S RULING IN *BATTERTON* v. *FRANCIS* DID NOT REACH ANY ISSUE POSED IN THE INSTANT CASE

Respondent Lloyd McCorkle contends (Br. 10-11) that *Batterton* v. *Francis* interpreted the meaning of the term "unemployment" in § 607(a) of the Social Security Act, and thus there is no need to review "any further question which may exist as to the meaning of 42 U.S.C. § 607(a)." McCorkle also contends that no other "substantial federal question" now exists with respect to the impact of state authorized payments of federal and state welfare payments to employees on strike because the Court in *Batterton* v. *Francis* "looked solely to the provisions of the Social Security Act" in rendering the decision. These conclusionary contentions are advanced without any analysis of or even references to this recent decision. In fact the Court in *Batterton* v. *Francis* dealt with one narrow, limited issue which does not affect the broader policy questions raised by the instant petition.

In *Batterton* v. *Francis*, one striking employee on behalf of all similar situated striking employees challenged eligibility regulations issued by the State of Maryland which denied AFDC-UF welfare benefits to all claimants who were ineligible for unemployment compensation under Maryland's Unemployment Insurance Law. This statute disqualified all claimants who engaged in a strike against their employer during a labor dispute. Section 6 Md. Ann. Code art. 95A (1969 Repl. Vol.). The State of Maryland defended its double disqualification on the grounds that amended regulation issued by the Secretary for HEW authorized such a disqualification. The sole issue presented in *Batterton* v. *Francis* was "whether the regulation is a proper exercise of the Secretary's statutory authority." (sl.op. p. 1). Or as Mr. Justice Blackmun also stated (sl.op. p. 8): "Thus, the actual issue we must decide is not how the statutory term ["unemployment"] should be interpreted, but whether the Secretary's regulation is proper."

In upholding the Secretary's regulation against the contention of Mr. Francis that benefit eligibility was required for any person who actually worked less than a minimum "hours-worked" standard, the Court held that "unemployment" could also be properly defined with respect to *why* a person is out of work, and that because Congress had left to the states some discretion to define unemployment, the Secretary could broadly prescribe standards which recognized "some local options."

The Court did *not* consider whether striking employees should be treated as "unemployed" under the Social Security Act because Maryland "incorporated its labor dispute rule as a disqualification for unemployment compensation" (sl.op. p. 13 n. 16) Thus, the Court noted that that part of the Secretary's regula-

tion which permits participating states to exclude (or include) striking employees from AFDC-UF benefits "is not directly at issue in this case" *Id.* Therefore, there was no warrant for the Court to consider whether this option was consistent with federal welfare policy. It is precisely this question—i.e. whether Congress intended participating states to confer welfare payments from either federal or wholly state created funds to employees on strike—which is presented in the instant petition. The Court did indicate, however, in agreement with the position advanced by Super Tire in the courts below and before this Court in the instant Petition for Certiorari, that (sl.op. p. 12):

> Exclusion of individuals who are out of work as a result of their own conduct and thus disqualified from state unemployment compensation is consistent with the goal of AFDC-UF, namely, to aid the families of the involuntarily unemployed."[14]

[14] In describing the bill on the floor of the House, a cosponsor stated that the concern was with the "involuntarily unemployed and I put the emphasis on the word 'involuntarily'." 107 Cong. Rec. 3767 (1961) (Remarks of Cong. Byrnes).

Similarly, because the State of Maryland *disqualified* striking employees from AFDC-UF benefits, there was no warrant or occasion for the Court to consider or reach the other important question posed in the instant petition—i.e., whether the *granting* of such benefits under this and other federal (AFDC) and state (New Jersey Public Assistance Law) (NJSA 44:8-107 *et seq.*) (New Jersey Assistance to Families of the Working Poor Law) (NJSA 44:13 *et seq.*) programs impinges upon or conflicts with the principle of free collective bargaining embodied in federal labor policy. This issue is squarely posed here, for in remanding the

case for disposition on the merits, the Court recognized in *Super Tire Eng'r Co.* v. *McCorkle,* 416 U.S. 115, 124 (1974):

> It cannot be doubted that the availability of state welfare assistance for striking workers in New Jersey pervades every work stoppage, affects every existing collective bargaining agreement, and is a factor lurking in the background of every incipient labor contract.

and then stated (416 U.S. at 124):

> The question, of course, is whether Congress, explicitly or implicitly, has ruled out such assistance in its calculus of laws regulating labor-management disputes.

Super Tire contends here that while federal labor stautes may not *explicitly* preclude strikers from receiving welfare benefits, it is clear that Congress has *implicitly* "ruled out such assistance" as inconsistent with federal welfare *and* labor policy.

In sum, then it is readily apparent that the Court has not yet addressed the significant questions now presented to the Court, and the relevance of *Batterton* v. *Francis* to these issues is only that the Court has recognized, as noted above, that the cooperative federal-state AFDC program (of which AFDC-UF is a part) was intended by Congress to benefit only those families with dependent children where the father is involuntarily out of work. Because employees on strike retain their jobs by express statutory language in Section 2(3) of the National Labor Relations Act and thus are not actually out of work, and because their refusal to work is not a result of economic forces beyond their control, it can not plausibly be maintained

that Congress has authorized in either the Social Security or National Labor Relations Act optional or mandatory welfare eligibility for employees who elect to strike their employer to compel acceptance of their collective bargaining demands.

Finally, Lloyd McCorkle contends (Br. 10-11) that the instant petition is inappropriate to review the fundamental question of strikers' eligibility for AFDC-UF benefits because New Jersey withdrew from this program after certain Super Tire employees obtained benefits under this program, and "neither the District Court nor the Court of Appeals addressed themselves to the meaning of 42 U.S.C. § 607(a)." In fact, however, the District Court did construe this statutory provision in light of legislative history and concluded (412 F.Supp. 192, at 196-97): "Neither the language of the [1968] amendment [to the AFDC-UF program] nor its legislative history indicate a congressional intent to define unemployment as excluding those out of work due to a labor dispute." The Court of Appeals declined to rule on this question only because it believed New Jersey's withdrawal from the program mooted Super Tire's appeal. 550 F.2d at 908-09. This issue is not moot because New Jersey has now opted to participate in this program effective July 1, 1977. As the Brief in Opposition candidly notes (Br. 4 **): "After the Third Circuit issued its decision, the New Jersey Legislature enacted legislation to restore New Jersey's participation in the AFDC-UF program, effective July 1, 1977. L. 1977, c. 127." And it is uncontested that Super Tires employees actually received benefits under this program during the May-June 1971 strike, and that the merits of this issue were fully briefed by all parties in the courts below. Here, where no factual issue remains and where the merits of eligi-

bility of this question have been properly presented below and remain at issue because of renewed participation in the AFDC-UF program, the erroneous mootness ruling of the Third Circuit can not be permitted to defeat review because the Court can properly resolve the fundamental eligibility question by reference to legislative history without remand. *Ohio Bureau of Employment Services* v. *Hodory*, —— U.S. ——, 97 S.Ct. 1898, 1905 (1977). Moreover, this case involves other state and federal welfare programs. It is uncontested that strikers obtained benefits under the federal-state AFDC program, as well as two New Jersey welfare programs. In these circumstances, the failure of the Court of Appeals to resolve one eligibility question with respect to the AFDC-UF program does not render this petition "inappropriate".[1]

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[1] Although Respondent Lloyd McCorkle does not specifically urge that the Court's summary ruling in *Kimbell, Inc.* v. *Employment Security Comm'n*, 429 U.S. 804 (1976) is dispositive of the federal labor law question presented in the instant petition, Respondent does recite (Br. 4) that the Court of Appeals considered it to foreclose such a challenge to New Jersey's *welfare* policy.

Accordingly, Super Tire wishes to call to the Court's attention a federal district court decision which, albeit involved different issues, concluded with respect to *unemployment compensation* eligibility for striking employees, that the *Kimbell* decision is limited to its particular facts. In *New York Tele. Co. et al.* v. *New York State Dept. of Labor*, —— F. Supp. —— (73 Civ. 4557) (S.D.N.Y. May 23, 1977) Judge Owen concluded (sl. op. pp. 34-36):

> On independent and careful consideration of the record and numerous briefs before the Supreme Court in *Kimbell*, I am compelled to conclude that the Court merely determined that the New Mexico compensation provisions, as a matter of *fact*, do not come into conflict with Federal labor law policy. I note that while the lower court in New Mexico found federal preemption, the reversal by the New Mexico Supreme Court was a summary reversal citing its prior decision, *Albuquerque-Phoenix Express*, which dealt entirely with state issues—construction of the relevant New Mexico statutes. I further note

(cont.)

II. LEGISLATIVE SILENCE DOES NOT CONSTITUTE CONGRESSIONAL APPROVAL OF FEDERAL-STATE WELFARE PAYMENTS TO EMPLOYERS ON STRIKE

Respondent Lloyd McCorkle's legislative history argument that Congress did not intend to disqualify

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that the Attorney General of New Mexico moved to dismiss the appeal in the Supreme Court on the ground that the question presented to the Court "does not raise a substantial federal question of preemption sufficient for this Court to take jurisdiction." New Mexico's brief in support of that proposition is illuminating:

> ". . . the New Mexico law, like a majority of the States' laws, does not provide for payment of benefits to strikers after a fixed period of disqualification. The general rule under New Mexico law is that claimants are disqualified from receipt of benefits for the duration of their unemployment resulting from a labor dispute which causes a substantial stoppage of work at their place of employment. As indicated in the record, the Employment Security Commission of New Mexico has allowed payment of unemployment compensation benefits to strikers in only three cases in its history, including the two cases discussed in this appeal, and only under facts similar to those present in this case where there has been no appreciable impact from the strike on the employers' continued business operations. In contrast to the Rhode Island law [sic], the interpretation by the New Mexico Supreme Court of the New Mexico unemployment compensation statutes provides no fixed or definite policy of payment of benefits to strikers, nor allows any expectations of such payment upon which employees could reasonably predicate labor dispute strategy. In fact, the interpretation by the New Mexico Supreme Court as to when benefit payments to strikers might be authorized runs directly counter to the employees strike objectives which is to impose as substantial an impact on the employers' business operations as possible to increase his economic burden and persuade him to a satisfactory settlement. To the extent this avowed strike strategy is realized, the eligibility of striking employees for benefits is defeated.
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> "It is apparent, therefore, that neither the statistical (cont.)

strikers from eligibility under the AFDC and AFDC-UF programs is not based upon one single instance of affirmative documentation in any legislative materials. Rather, this argument is premised upon the failure of Congress to proscribe specifically such eligibility. However, this very premise has been nullified in *Burns* v. *Alcala*, 420 U.S. 575, 580-84 (1975), where the Court held that Congressional silence is *not* the equivalent of an affirmative indication of eligibiilty because "Congress has not undertaken to provide support for all needy children. . . ." *Id.* at 582-83 n. 9. Moreover, as we show below, Congress has not enacted a specific prohibition of strikers participation in welfare programs because these programs *prima facie* exclude strikers.

Respondent urges (Br. 6-7) that the failure of Congress to prohibit welfare payments to strikers in either the original Social Security Act of 1935 or the Wagner Act of 1935, or the Unemployment Compensation Act

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> history of payment of benefits to strikers nor the inconsistency between strike objectives and eligibility for benefits is likely to make the administration of the New Mexico unemployment compensation law a factor in labor dispute negotiations or to interfere with federal labor policy. The case on appeal here as well as the *Albuquerque-Phoenix Express* case illustrates this point. In neither case did the Employment Security Commission ever reach a decision on the eligibility of the claimants for benefits until the labor dispute was settled between the parties and a new contract agreement signed."

Obviously, the factual and legal position of the Attorney General of New Mexico would be a sound and compelling basis for the Supreme Court's dismissal on the merits. I find this to be the basis for the ruling and conclude that *Kimbell* is at the very least inapplicable and does not preclude me from reaching the issues in this case on the merits.

of 1935 means Congress intended at least optional eligibility at the election of the states. However, these legislative enactments were all addressed to different evils and do not on the whole or in part signal Congresional approval of state or federal welfare payments to strikers.

Title IV of the Social Security Act created the AFDC program and was limited on its face to children who became needy because of the death, absence, or incapacity of a parent. 42 U.S.C. § 606(a). "AFDC was not originally designed to assist children who are needly simply because the family breadwinner is unable to find work. . . ." *Batterton* v. *Francis,* —— U.S. ——, sl.op. p. 2. "At present needy families in which need is occasioned by unemployment are not eligible for any type of 'federal' assistance. . . ." S.Rep. No. 165, 87th Cong., 1st Sess. 1 (1961). Because this program was not intended to apply to any employable breadwinner, it was wholly unnecessary for Congress to prohibit payments to striking employees. Thus, the failure of Congress to enact such a prohibition prior to 1961 is irrelevant.[2]

Other provisions of the 1935 Social Security Act were directed at alleviating the widespread unemployment caused by the Great Depression. Unemployment benefits were not to go to striking employees but to those "who are thrown out of work suddenly." Hearings on H.R. 4120 before the House Committee on Ways and Means, 74th Cong., 1st Sess. 214 (1935). This limitation was specifically reflected in the draft

[2] There is no indication that receipt, if any, of welfare benefits by strikers in pre-1935 federal programs was intended by Congress. In the chaos of the Great Depression, payments may have gone to striking employees by administrative oversight.

bills issued by the Social Security Board which expressly included a labor dispute disqualification for employees whose work stoppage (strike) occurred during a labor dispute. Indeed, the states could even disqualify employees temporarily laid off as a result of a strike at a separate employer's facility in order to insure that adequate funds would be available to aid those who had their contract of employment totally severed by recessionary business cycles. See *Ohio Bureau of Employment Services* v. *Hodory,* —— U.S. ——, 97 S.Ct. 1898 (1977). Similarly, it was obvious that *unemployment* compensation should not be paid to persons however "innocent" who were not unemployed. Otherwise states would risk depletion of unemployment funds and create expectations in out of work persons which could not be met.

Of course the Wagner Act was passed in 1935 to protect the public right of *employed* workers to strike and thus to use self-help to achieve improved terms and conditions of employment. And Congress insured that striking employees would not concurrently forfeit their job by preserving their employment relationship with the struck employer. 29 U.S.C. §§ 152(3), 163. Since such workers remained employed by specific legislative mandate, it was hardly necessary to expressly prohibit payment of AFDC welfare benefits created "to allow widows and divorced mothers to care for their children at home without having to go to work, thus eliminating the practice of removing needy children in situations of that kind to institutions." *Batterton* v. *Francis,* —— U.S. ——, sl.op. p. 2.

Lloyd McCorkle next urges (Br. 7-8) that the creation of the AFDC-UF program was an "obvious occasion for Congress to address the subject of welfare

benefits for strikers. . ." But as this Court stated in *Batterton* v. *Francis supra,* p. 4, this program was aimed at the involuntarily unemployed, specifically, those breadwinners who had their contract of employment severed by the 1959-60 economic recession. 107 Cong. Rec. 1677, 1679 (1961) (Message of Pres. Kennedy). Since striking employees retain their job rights, it is far from obvious that a welfare program aimed at the unemployed father should also contain a specific prohiibtion of striker eligibiilty. It is likewise incongruous to argue as does Respondent McCorkle (Br. 8) that the absence of such prohibition when Congress added the WIN provisions to the AFDC program in 1967 is an affirmative indication of Congressional approval of striker eligibility. This amendment provided work training programs to assist unemployable persons "acquire a sense of dignity, self-worth, and confidence which will flow from being recognized as a wage-earning member of society. . . ." 42 U.S.C. § 630 (1970). Since striking employees are in fact wage-earning members of society, and recognized as such even by the Dept. of Labor, it is not surprising no express prohibition appears in the legislation. And as we have urged in the Petition (p. 17 n. 18), post 1972 efforts to enact a striker disqualification more reasonably constitute clarification of original legislative intent, rather than affirmative approval by negative action.[4]

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[3] Workers involved in labor disputes are classified as "employed persons" for purposes of unemployment figures. Handbook of Labor Statistics 1-2 (1970).

[4] McCorkle's argument (Br. 8-9) notwithstanding, deletion of an express prohibition before passage of the 1972 welfare amendments does not create a "common understanding" of affirmative eligibility. The Senate did not consider this question because a majority

Finally, Respondent McCorkle argues (Br. 6, 9) that because Congress has provided strikers' benefits under the Railroad Unemployment Insurance Act (45 U.S.C. § 354(a-2)(iii)) and apparently under the Food Stamp Act, it can be fairly claimed that Congress has indicated that strikers should be treated the same as non-strikers in all federal-state welfare programs. But these specific enactments indicate that when Congress has intended eligibility for striking employees, it has done so expressly. Moreover, no analogy in favor of broad welfare eligibility from these unique and limited statutes can be persuasively drawn. In 1938 Congress removed railroad workers from the state unemployment compensation provisions of the Social Security Act and placed them under specific federal coverage. Under this federal insurance system unemployment compensation is authorized only if a railroad strike is not contrary to the Railway Labor Act[5] or local union rules. This legislative change was made to create an incentive for railroad workers to support the peaceful resolution of labor disputes and to discourage resort to "wildcat" strikes in an industry vital to the public interest. *Bhd. of Railway Clerks* v. *Railroad Retirement Bd.,* 239 F.2d 37, 42-3 (D.C. Cir. 1956). This legislative judgment reflects the underlying premise of this case that economic factors directly influence the decision to strike. In any event this legislative change limited to railroad workers did not signal a general congressional design or desire to create welfare compensation for striking workers in other industries.

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of Senators believed this eligibility question should be first considered by the Senate Labor and Public Welfare Committee. 118 Cong. Rec. 33993 (1972) (Remarks of Sen. Williams).

[5] 44 Stat. 577 (17926), 45 U.S.C. §§ 151-163.

While Congress was willing to permit possible interruptions to interstate commerce in other segments of the economy subject to the jurisdiction of the National Labor Relations Board, the Railway Labor Act is designed through direct federal intrusion into labor disputes by way of binding arbitration (45 U.S.C. §§ 157, 158(a)) and emergency no strike provisions (45 U.S.C. § 161) to protect interstate commerce from the loss of essential transportation services. *Texas & N. O. R.R.* v. *Bhd. of Railway Clerks,* 281 U.S. 548, 564-66 (1930). Indeed, unlike the private sector where economic power in the form of the strike and lockout determine the content of collective agreements, under the Railway Labor Act "minor disputes" are subjected to compulsory arbitration and strikes over such issues are enjoinable by federal courts. *Bhd. of Trainmen* v. *Chicago River & I.R.R.,* 353 U.S. 30 (1957). Thus, there can be no basis for inferring from this legislation that Congress believed direct state created availability of welfare compensation for striking employees in the unregulated sectors of industry would be a permissible restructuring of an existing balance of economic power between labor and management during collective bargaining. Indeed, the lower courts have been cautioned against drawing analogies from this legislation. "Both its history and the interests it governs show the Railway Labor Act to be unique." *Whitehouse* v. *Illinois Cent. R.R.,* 349 U.S. 366, 371 (1955). See also *New York Tele. Co.* v. *New York State Dept. of Labor,* — F.Supp. —, sl. op. 29-30.

Similarly, the Food Stamp Act of 1964 was designed to provide eligible households "an opportunity to obtain a nutritionally adequate diet." 7 U.S.C. § 2013(a), and the provision of the Act cited by Respondents

(7 U.S.C. § 2014(c)) was enacted to preserve federal neutrality in labor disputes by not requiring unemployed food stamp recipients to become strike breakers in order to *maintain* eligibility. This language was not directed to initial eligibiilty of striking employees. The House Agricultural Committee's report specifically refers to eligibility "to those who, *through no fault of their own,* need food stamp assistance." H.R. Rept. No. 91-1402, 91st Cong., 2nd Sess. 10 (1970). At most then, families who have previously qualified for food stamp benefits do not forfeit them by participating in a strike. It is at least an overstatement to read into these two statutes Congressional approval of direct financial aid to workers in the private sector whose sole "need" for welfare payments arises from their own election to strike their employer to obtain higher wages and benefits.

CONCLUSION

For the reasons stated above as well as those presented in the Petition, the writ of ceritorari should be granted.

Respectfully submitted,

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